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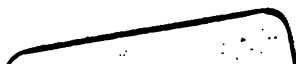
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**REPORTS OF CASES**  
ARGUED AND DETERMINED  
IN  
**The Court of King's Bench,**  
DURING  
HILARY TERM, NINTH AND TENTH GEO. IV.  
AND  
EASTER AND TRINITY TERMS, TENTH GEO. IV.

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BY  
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AND  
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BARRISTERS AT LAW.

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VOL. IV.

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WITH AN INDEX,  
AND  
*TABLE OF PRINCIPAL MATTERS.*

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A

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# CASES

ARGUED AND DETERMINED

IN THE

*COURT OF KING'S BENCH,*

IN

HILARY TERM,

IN THE NINTH AND TENTH YEARS OF THE REIGN OF GEORGE IV.

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SINCLAIR and another v. BOWLES.

1829.

ASSUMPSIT for work and labour done, for materials found, and for goods sold and delivered. Plea, non assumpsit; and issue thereon. At the trial before *Parke, J.*, at the London sittings in this term, the case was this: The plaintiffs, who were glass cutters and benders, had repaired three glass chandeliers for the defendant, who was a tavern keeper; and it was proved on their part that 10*l.* was a reasonable charge for the work they had performed and the materials they had provided. The following defence was then set up. In April, 1828, one of the plaintiffs applied to the defendant, inquiring if he wanted any new chandeliers. He replied that he did not, but that he wanted some old ones repaired, and he shewed the plaintiff some old chandeliers, desiring him to examine them carefully, and to say for what sum he would repair them. The plaintiff said he would repair them for 8*l.* The defendant remarked that

Upon an *entire* contract, as, "to repair a damaged chandelier and make it *complete* for 10*l.*," assumpsit will not lie for the value of a *partial* repair, though such repair was beneficial to the defendant, and consisted partly in a supply of goods, such goods not having been demanded back.

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they wanted a great deal to be done to them, and that if the plaintiff would do them complete, so as to look well, he would give him 10*l*. The plaintiff again examined the chandeliers, and then said that he would make them complete for 10*l*. The plaintiff went the next day to fetch the chandeliers away, when he was cautioned by the defendant not to take them away unless he could make them complete for 10*l*. The plaintiff took them away, and returned them in a few days. They were not then complete. They had been cleaned, and some drops and icicles had been added; but one of the branches, which had been perfect when removed, was broken; the scroll of one chandelier which was damaged when removed remained in the same state; and several drops and spangles were damaged: the defendant in consequence refused to pay any thing. It was contended on the part of the plaintiffs, that even upon this evidence they were entitled to recover the value of the work actually done, and the materials actually supplied. The learned Judge thought otherwise. He considered the contract between the parties as entire, and that the plaintiffs were not entitled to recover at all, unless they had made the chandeliers complete. To prevent further expense, however, he left it to the jury to say, upon the whole of the evidence, first, whether the contract had been substantially performed according to the intention of the parties, and, if not, secondly, to what amount, if any, the defendant had been benefited by the work actually done. The jury found, first, that the contract had not been performed; and, secondly, that the defendant had been benefited to the amount of 5*l*. by the work actually done. His Lordship then directed a nonsuit, with liberty to the plaintiffs to move to enter a verdict for 5*l*.

*Gurney* now moved accordingly. The jury have found that the defendant has received a benefit by the work actually performed by the plaintiffs, and for that he is in justice bound to pay. [*Bayley*, J. It was an entire contract, and

the plaintiffs were never discharged from their obligation to complete it.] Still the action is maintainable pro tanto. Where an entire contract for the supply of goods is performed in part, by a delivery of some of the goods which the vendee does not return upon failure by the vendor to deliver the residue, the vendor is entitled to sue for the value of the goods delivered, and the vendee is left to a cross action for the non performance of the contract. Here the plaintiffs not only cleaned the chandeliers, but supplied some drops and icicles. Those ought to have been returned; and not having been returned, they ought to be paid for. [*Bayley, J.* I think not. The plaintiffs might either have completed their contract, or might have demanded the return of the articles they had furnished. The defendant was entitled to insist upon the full performance of the contract.] There were counts for goods sold and delivered, and as the defendant kept the goods that were supplied, the plaintiffs may recover for their value, independently of the contract.

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**LORD TENTERDEN, C. J.**—The plaintiffs might have demanded the articles they had supplied. The contract was entire. The plaintiffs undertook to make the chandeliers complete for 10*l*. They have not performed their part of the contract, and consequently they are not entitled to recover any thing. The nonsuit, therefore, was right.

**BAYLEY, J.**—I think it quite clear that the nonsuit was right. The plaintiffs entered into an entire contract. They performed it in part, but they failed to complete it. It was their duty either to perform the contract altogether, or to demand back the articles they had supplied in the part performance. They did neither, therefore they have no right to recover at all.

The other Judges concurred.

Rule refused.



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... financial liability.



correctly presented to them, and I feel no dissatisfaction at the verdict they have found.

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BAYLEY, J.—No man can doubt, that when the drawer of the bill made it payable at his own house, he knew that there would be no effects in the hands of the acceptor to pay it when due, and that he must provide for it himself. I am entirely of opinion that the case has been properly disposed of.

The other judges concurred.

Rule refused.

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EX PARTE SYLVESTER.

THIS was a rule nisi for a certiorari to remove into this Court, for the purpose of its being quashed, a conviction, under the 5 Ann. c. 14, for keeping and using a gun to kill and destroy game without a qualification. The conviction stated in substance, that on the 2d September an information was laid before a magistrate against *Sylvester* for keeping and using a gun to kill and destroy game, he not being a qualified person; that *Sylvester*, having been duly summoned, personally appeared and pleaded not guilty; that thereupon one *A. B.*, a credible witness in that behalf, being duly sworn, deposed, that on the 2d September *Sylvester*, not having lands, &c., nor being otherwise qualified, did keep and use a certain gun to kill and destroy the game, the same gun then and there being an engine for the killing and destroying such game, contrary to the form of the statute, &c.; that the said *A. B.* saw *Sylvester* on the said 2d September shoot a partridge with the said gun, and that one *C. D.* was with *Sylvester*, but did not shoot; that thereupon *Sylvester* said he was not guilty of the said offence, and in order to prove the same, the said *C. D.* came and deposed, that on the said 2d September he was seised

An unqualified servant going out with his qualified master, and shooting game in his presence and for his use, is liable to a penalty under 5 Ann. c. 14, for keeping and using a gun to kill game.

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of an estate of inheritance in possession in his own right, of the clear yearly value of 100*l.* and upwards; that *Sylvester* was on the said 2d September employed by him as his servant to accompany him into the field sporting; that *Sylvester* on that occasion shot with a gun of his, *C. D.*, in his presence and by his order and for his use, at game, and that he, *C. D.*, did not shoot at game, or use a gun for that purpose on that day; that he had taken out a certificate to kill game, and was qualified in his own right to do so; and that *Sylvester* shot at the partridge before mentioned as his servant, and for his use. Whereupon, &c.; adjudication of conviction of *Sylvester*.

*Campbell* shewed cause. The conviction was right, and this rule must be discharged. It is not pretended that *Sylvester* himself was qualified, or that he was a game-keeper appointed by virtue of the power given to the lord of a manor by the fourth section of the 5 *Ann.* c. 14. The only answer given to the information was, that *Sylvester* was sporting in the presence of his master, who was a qualified person, and by his order and for his use. But that is no justification of the servant, because the use of the gun by him cannot be considered as the act of the master, in which view alone, according to all the cases, would the presence of the master protect the servant.

*Tulfourd*, *contra*. The use of the gun by the servant in this case may be fairly considered as the act of the master, and if so, it is admitted that *Sylvester* was improperly convicted. There are several cases upon the point undistinguishable in principle from the present. In *Rex v. Taylor* (a) it was held, that a groom attending his qualified master while using dogs for killing game, and pursuing it by his master's command, was not liable to any penalty. In *Lewis v. Taylor* (b) it was held, that an unqualified person going out with the qualified owner of greyhounds to course

(a) 15 East, 460.

(b) 16 East, 49.

a hare, was not liable to any penalty, though he took an active part in the sport by beating the bushes to find a hare, and took it up after it was killed. In *Walker v. Mills* (a), the servant of a qualified person assisted his master in setting a trap on his land for taking rabbits and vermin, and his master ordered him, if a hare should be caught, to bring it to him; a hare was caught in the absence of the master, and was killed and carried to him by the servant; it was held, that the servant was not liable to a penalty for using a snare to destroy game. The only difference between the last case and the present is, that here the servant used a gun instead of a trap; but both are engines for the destruction of game within the statute 5 Ann. c. 14; therefore, that case is a direct authority against the present conviction.

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BAYLEY, J. (b).—The present case appears to me to differ in principle from all those which have been cited. The principle upon which the two former proceeded was, that the using the dogs was the act of the master and owner, and not of those who accompanied him. So in the latter the principle of the decision was, that the trap being set by the order of the master and in his presence, must be considered as having been set by him. But I think it is impossible to say that of using the gun in the present case; neither the hand nor the skill of the master was employed: it was the hand and the skill of the servant only. If the firing of the gun by a servant could be held to be the act of the master, he might take out twenty servants with him in the same manner, and contend that the use of twenty guns by twenty persons at the same time was his own act. I think the gun must be considered as being used by the person who actually fired it, and in that view of the case it differs

(a) 4 J. B. Moore, 343; 3 Brod. & Bingh. 1. And see *Molton v. Rogers*, 4 Esp. 217; *Turner v. Coningsby*, Bull. N. P. 169; *Hawke v. Jacka*, 2 Selw. N. P. 7th ed. 886; *Clark v. Broughton*, 3 Camp. 328.  
(b) Lord Tenterden, C. J. was absent.

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from the authorities that have been cited, and it follows that this party was properly convicted.

LITTLEDALE, J. concurred.

PARKE, J.—I am entirely of the same opinion. I would merely add, that the case of *Walker v. Mills* (a), which was most relied upon by Mr. *Talfourd*, differs from the present in another respect, namely, that there the trap was used with the intent to destroy vermin, and thereby prevent a nuisance, and not, as the gun was in the present case, for the purpose of killing game in the ordinary mode of sporting.

Rule discharged.

(a) 4 J. B. Moore, 343; 3 Brod. & Bingh. 1.

### The KING v. HALPIN.

A defendant brought up for judgment after being convicted of publishing a libel imputing indictable offences to the prosecutor, cannot be allowed, in mitigation of punishment, to read affidavits alleging the truth of the libel.

THIS defendant had been convicted of publishing a libel, which imputed to the prosecutor that he had been guilty of perjury, and other indictable offences. Upon his being brought up for judgment, he, by his counsel, tendered, in mitigation of punishment, affidavits alleging that the prosecutor had committed the offences imputed to him by the libel.

*Campbell* and *Ludlow*, Serjt., objected that such affidavits could not be read. They quoted *Rex v. Burdett* (b), and *Rex v. Finnerty* there cited, and relied upon those authorities as decisive on the point.

*Curwood* and *Busby*, contra. The present case differs from those cited. The affidavits tendered and rejected in those cases reflected upon the character and conduct of

(b) 4 B. & A. 314.

third persons not then before the Court; whereas, the affidavits now tendered affect the prosecutor only, who is before the Court, and in the character of prosecutor, which he has elected to adopt, and of the inconveniences attending which he has, therefore, no right to complain. These affidavits undoubtedly shew, not only that the defendant believed the contents of the libel to be true at the time when he published it, but also that parts of those contents actually are true; and such matter appears upon principle properly admissible in mitigation of punishment: because, to publish a libel of a guilty person, though in the wisdom of the law not strictly justifiable, is surely a much lighter offence than to publish it of an innocent person. In *Rex v. Burdett* (a), upon the Attorney-General stating, that "in *Rex v. Finnerty* affidavits of the truth of the facts stated in the libel were refused in mitigation of punishment," *Best, J.*, is reported to have interposed, and observed, "in *Rex v. Draper* (b) the Court received such affidavits, but I believe it was with the consent of the prosecutor." His lordship afterwards, in the course of his judgment (c), observed, "The present case is very distinguishable from *Rex v. Draper*, to which I have called the attention of the Court. The libel of the defendant, there, consisted in a statement of facts within his own knowledge; but that which induced the defendant to publish this libel, was the statement of facts which he read in the newspapers." Now the reason there given for distinguishing *Rex v. Draper* from the case then before the Court, is of equal weight to assimilate it to the present case, and to render it an authority for the reception of the affidavits now tendered. Again, in the marginal note of *Rex v. Draper* (d), it is said, "*Semble*, although the truth of a publication is no justification, yet if the Court see that it is true, or probably may be true, it may be good cause why the Court should not interfere by granting a criminal information." Now the only mode by which the

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(a) 4 B. & A. 321.

(b) 3 Smith, 391.

(c) 4 B. & A. 328.

(d) 3 Smith, 391.

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Court could be informed of the truth of the libel, would be by reading the defendant's affidavits to that effect; and if such affidavits are receivable to prevent inquiry into the guilt or innocence of a defendant, *à fortiori* they are receivable, after proof of his guilt, in mitigation of his sentence.

LORD TENTERDEN, C. J.—The affidavits now tendered charge the prosecutor with the commission of several offences, for each of which the defendant might and ought to have prosecuted him, if the charge is true. I cannot distinguish this case in principle from that of *Rex v. Finnerty*, and upon the authority of that case I am clearly of opinion that we ought not to receive these affidavits. The defendant is at liberty to read his own affidavit, stating, that at the time when he published the libel he believed its contents to be true, and setting out reasonable grounds for such belief. To go further, would be in effect to put the prosecutor upon his trial upon affidavit, which would be a most unjust proceeding.

BAYLEY, J.—I am entirely of the same opinion. It seems to me impossible, upon any substantial principle of justice, to receive such affidavits as these. It would be trying the prosecutor upon affidavit, and placing him in a situation of peril and injustice, to which we have no right to expose him. It would be far better, of the two, to permit the defendant to give parol evidence of the same nature at his own trial<sup>(a)</sup>, for then the prosecutor would have the advantage of cross-examining the witnesses, which he cannot have here. The Court has, I believe, never yet gone further than receiving the defendant's affidavit of his belief of the truth of the libel when he published it, and I am perfectly satisfied that is the furthest we can go consistently with justice.

(a) *Rex v. Bradley*, ante, vol. ii. 152.

PARKE, J.—(a) I entirely concur with the rest of the Court upon this subject. No authority has been cited for the reception of such affidavits as are now tendered, for I cannot consider *Rex v. Draper* as a direct authority upon that point. There are authorities the other way, to which we are bound to adhere. I, for one, should require very strong authorities indeed to induce me to come to a different decision.

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Affidavits rejected. (b)

- (a) *Littledale, J.*, had gone to chambers before the case came on.  
(b) *Rex v. Bradley*, *ante*, vol. ii. 152.

FRANKLIN v. The Bank of ENGLAND.

THE following case was sent by the Lord Chancellor for the opinion of this Court:—

*John Franklin*, by his will bearing date 29th November, 1822, attested by three witnesses, gave, devised and bequeathed unto *Thomas Franklin*, the manors, messuages, lands, freehold, leasehold and copyhold estates, hereditaments and premises therein mentioned and described, to hold the same unto the said *Thomas Franklin* for the term of his life, without impeachment of waste; and after the decease of the said *Thomas Franklin*, the said testator gave, devised and bequeathed the same unto *George Jones Bevan* and his heirs, to the uses therein and hereinafter mentioned, that is to say, to the use of the said testator's grandson, *Richard Franklin*, who was the son of the said *Thomas Franklin*, and his assigns for his life, without impeachment of waste; with remainder to the use of the said *George Jones Bevan*, in trust to preserve contingent remainders; with several remainders and limitations over in tail, in favour of the issue of the said *Richard Franklin* and of the said *Thomas Franklin*, and with the ultimate limitation to his,

Where stock is specifically bequeathed, the executor may compel the Bank to permit him to transfer it, unless it appear that he has assented to the devise.



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the testator's, own right heirs. And the said testator, in and by his said will, gave and bequeathed all the moneys which he might have at the time of his decease in the 3*l*. per cent. consolidated Bank annuities, or any other public funds, unto his cousin *Catherine Bevan*, spinster, since deceased, and the said *George Jones Bevan*, and the survivor of them, upon the trusts, and to and for the several uses, intents and purposes therein and hereinbefore mentioned and referred to, concerning his real estates thereinbefore devised, or as near thereto as the nature of the respective estates would admit; and, after giving certain legacies of trifling value therein mentioned, the said testator, by his said will, gave, devised and bequeathed all the rest, residue and remainder of his goods, chattels, real and personal estate whatsoever and wheresoever, subject to the payment of his just debts, funeral and testamentary expenses, the foregoing legacies, and also such other legacies as he might bequeath, in and by a codicil which the said testator declared he intended to add to that his will, unto the said *Thomas Franklin*, his heirs, executors, administrators and assigns, to and for his and their own use absolutely; and he thereby nominated and appointed the said *Thomas Franklin* sole executor thereof. By a codicil to his will, dated 28th November, 1824, executed in the presence of and attested by two witnesses, the said testator, among other things, bequeathed unto the said *Richard Franklin* the sum of 10,000*l*., with the payment of which sum he charged all his real and personal estate devised and bequeathed by his said will; and he thereby, in all other respects, confirmed his said will. The sum of 16,000*l*. 3*l*. per cent. consolidated annuities was standing in the name of the testator, *John Franklin*, in the books of the Bank of England, on the 29th November, 1822, the date of his will, and on the 22d March, 1823, the further sum of 500*l*. like annuities was transferred into the name of the said *John Franklin* in the books of the said company, making together the sum of 16,500*l*.; and on the 29th November,

1824, the said *John Franklin* died, without having revoked or altered his said will or codicil; and the said sum of 16,500*l.* 3*l.* per cent. consolidated annuities continued to be and was standing in the name of the said testator, *John Franklin*, until and at the time of his death. *Thomas Franklin*, the executor, on the 30th December, 1824, proved the said will and codicil in the Prerogative Court of Canterbury, and on the 2d January, 1825, caused the same to be registered in the books of the Bank, when an extract of so much as related to the said annuities was duly entered. On or about the 3d February, 1825, *Thomas Franklin* demanded permission of the Bank to transfer the whole of the said annuities to such persons as he should think fit, to enable him to pay the testator's debts and legacies, when the officers of the Bank refused to permit him to make such transfer, on the ground and by reason that the said sum of stock ought to be transferred into the names of the said *Catherine Bevan* and *George Jones Bevan*, to whom the same is given and bequeathed in and by the said will. A bill has been filed by the said *Thomas Franklin* in the High Court of Chancery, to compel the Bank to allow the said plaintiff to sell and transfer the said stock. No evidence was given in the suit that there were any debts due or owing by the said estate at the time of such demand. The question for the opinion of the Court is, whether, under the circumstances above stated, *Thomas Franklin*, the executor, has any right of action against the Bank, for not permitting the transfer by him of the said 16,500*l.* 3*l.* per cent. consolidated annuities.

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*Alderson* for the plaintiff. The question is, whether the plaintiff, as executor, is the legal owner of the stock, because, if he is, he has a right to transfer it, and may maintain an action against the Bank for preventing the exercise of that right. Now by the statutes 7 *Ann.* c. 7, and 1 *Geo.* 1., c. 19, the three per cent. consolidated Bank annuities are made and declared to be personal estate. It

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follows that such property is subject to all the consequences of being personal estate, one of which is, that the stock, though specifically devised to a legatee, vests in the executor, until he assents to the legacy. This is the clear rule of law upon the subject; and any other would give rise to great difficulties. It will not, it is presumed, be denied, that where there is no specific devise the stock vests in the executor. But it is frequently a question of much intricacy whether a legacy is specific or not; and if the officers of the Bank are to have the power of transferring to the legatee instead of the executor, they must also have the power of determining, and, indeed, must begin by determining, that question. Another of the consequences alluded to is, that the stock being personal estate is assets in the hands of the executor for the payment of the testator's debts; but if he is not allowed to transfer the stock, and an action is brought against him by a creditor of the estate, he will be in a situation of extraordinary hardship, for he will be unable to plead *plené administravit* on the one hand, and unable to pay the debt out of the assets on the other. Further, it has been decided that no action at law lies against an executor for a pecuniary legacy, but that it must be recovered by a suit in equity, *Deeks v. Strutt* (a); the reason being, that in case of such a legacy being bequeathed to a married woman, the husband may be compelled to make a proper settlement. Now the reason of the rule would apply equally to a bequest of stock; but the rule itself will not apply, if it be held that the stock vests in the legatee, and not in the executor, until he assents to the legacy. The point has been repeatedly mentioned in the courts of equity, but it has never yet been decided; though in one case, *The Bank of England v. Lunn* (b), the Lord Chancellor seems to have been of opinion that the stock vested in the executor.

(a) 5 T. R. 690. And see *Farish v. Wilson, Peake*, N. P. C. 73. (b) 15 Ves. 569.

*Bosanquet*, Serjt. contrà. It was laid down by Lord *Rosslyn*, in *The Bank of England v. Parsons* (a), that the Bank directors are not bound to look to the trusts of a will, a decision which relieved them from much difficulty. If it shall be decided by this Court that they are not bound to inquire whether an executor has assented to a specific legacy or not, that also will relieve them from much difficulty. But if it be held that they are bound to make that inquiry, and to allow the executor to transfer in those cases only where he has not assented to the legacy, much difficulty will be thrown upon them. For instance—It is admitted that if the executor assent to a specific bequest of personal property, the property vests at once in the devisee, and he may maintain an action to recover it. Suppose then the case of a specific bequest of stock, which the executor, upon stating that he has not assented to the legacy, is allowed to transfer, and the legatee afterwards shews that the executor had assented to the legacy, and claims the stock: what situation would the Bank directors be in? They would be liable to an action by the legatee, though they had before been compelled to give up the stock to the executor. [Lord *Tenterden*, C. J. I should doubt their being liable in such an action. The legatee can neither transfer the stock, nor receive the dividends, independently of the executor; then how can he maintain an action for it? What would be the law in the case of an ordinary bequest of a chattel in the hands of a third person, if the executor first assented to the legacy, and afterwards got possession of the chattel? Would the legatee have an action against the third person to recover the chattel which he had delivered to the executor?] According to the case of *Doe v. Guy* (b), it should seem that he would. [Bayley, J. That case only decided that an action at law lies against an executor to recover a specific chattel bequeathed, after his assent to the legacy. The action there was brought against the executor, and it did not appear that he claimed the term as assets for the

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(a) 5 Ves. 665.

(b) 3 East, 120.

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payment of debts.] It has never been decided that stock is legal assets for the payment of debts. [Lord *Tenterden*, C. J. Perhaps not; but I am not aware that it has ever been doubted.] The nature of the property would seem to justify such a doubt. It is a debt (a) from the public to the individual, and though the dividends may be assets, the stock itself can scarcely be so, before it is converted into money. A Court of equity may compel a sale, but until sold, the stock itself is not assets at law. The present question is undoubtedly one of difficulty, and has been so regarded in many cases. In *Pearson v. The Bank of England* (b), Lord *Thurlow* seems to have thought that stock would vest in a specific legatee without the assent of the executor. In *The Bank of England v. Moffatt* (c), he inclined to the contrary opinion; but that was a case of a residuary bequest which included stock. In *The Bank of England v. Lunn* (d), Lord *Eldon* intimated a doubt whether it was not the intention of the legislature that the legatee of stock should take under the bequest without the assent of the executor; but the case was afterwards decided on another ground. The Acts of Parliament relating to the subject seem to be in favour of Lord *Eldon's* suggestion. The statutes of 5 *Ann.* c. 19, s. 22; 1 *Geo.* 1, st. 2, c. 19, s. 12; 5 *Geo.* 1, c. 19, s. 26; and 30 *Geo.* 2, c. 19, s. 49, all of them provide, and nearly in the same words, that all persons possessed of any share in the joint stock of annuities may devise the same by will, in writing, attested by two or more credible witnesses; but that no payment shall be made on any such devise till so much of the will as relates to any share, estate, or interest in the joint stock of annuities be entered in the office; and that in default of such transfer or devise, such share, estate, or interest, shall go to the executors or administrators. Now it cannot have

(a) Or rather an *annuity* not represented by any capital, as against the public, though, as against the creditor, redeemable at the nominal par.

(b) 2 *Cox*, 175; 2 *Brown*, C. 529.

(c) 3 *Brown*, C. C. 260.

(d) 15 *Ves.* 569.

been the intention of the legislature, in such a case, that the executor or administrator should receive the stock for his own benefit; the meaning of the provision, therefore, must be, that where there is no devise the legal interest shall vest in him, but that where there is a specific devise the legal interest shall vest in the devisee.

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*Alderson* in reply. The only inconvenience the Bank directors can sustain, is the burthen of inquiring whether the executor has or has not assented to the legacy. This inconvenience they suffer in common with all parties who have property in their hands, to which two conflicting claims are made; and for this, they have, in common with such parties, a simple and effectual remedy, by a bill of interpleader. For the difficulties that would attend the executor, there would be no remedy. The Bank are bound to transfer to the person in whom the legal interest is vested. It is conceded that they must do so where the stock forms part of a residuary bequest; and there is no real distinction between a residuary and a specific bequest. *Mead v. Lord Orrery* (a). They cannot be allowed to decide questions of law between the devisee and the executor, what is a specific devise or not, or what is its legal operation; in cases of real doubt they may file an interpleader.

The following certificate was sent by the Judges of this Court to the Lord Chancellor:—

“This case has been argued before us by counsel, and we are of opinion that, under the circumstances above stated, *Thomas Franklin*, the executor, has a right of action against the Bank, for not permitting the transfer by him of the said 16,500*l.* 3 per cent. consols.

TENTERDEN,  
J. BAYLEY,  
J. LITTLEDALF,  
J. PARKE.”

(a) 3 Atk. 239.

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## FREAKLEY v. EDWARD FOX.

If the holder of a promissory note appoint the maker his executor, the debt is discharged, and no action lies on the note, even by the indorsee of the executor.

**DECLARATION** in assumpsit. The first count stated, that the defendant on, &c., made his promissory note, and thereby promised to pay on demand to *R. Reeves*, in his lifetime, since deceased, or order, 300*l.*, with interest; that *Reeves* made his will, and appointed *E. C.*, *C. C.*, *E. A.*, and *Edward Fox*, executors thereof; that *Reeves* afterwards died, and the said *E. C.*, *C. C.*, *E. A.*, and *Edward Fox*, thereupon duly proved the will, and took upon themselves the burthen of the execution thereof; that afterwards, and before the indorsement thereafter next mentioned, to wit, on, &c., *C. C.*, one of the said executors, died; and that the said *E. C.*, *E. A.*, and *Edward Fox*, so being surviving executors of the last will and testament of *Reeves*, afterwards, to wit, on, &c., as such surviving executors, indorsed the note to the plaintiff, whereby, &c. the defendant became liable to pay the money in the note specified to the plaintiff. The second count omitted the death of *C. C.*, and stated the indorsement to have been made by *E. A.*, as *one of the executors of Reeves*. Plea, (the fourth, the only one material on the present occasion,) that *Reeves*, on, &c., duly made his will, and constituted and appointed the defendant, together with *E. C.*, *C. C.*, and *E. A.*, joint executors thereof, and died, without altering or revoking his said will; and that afterwards, and after the death of *Reeves*, and before the said supposed indorsement of the note, the defendant duly proved the will of *Reeves*, and took upon himself, together with *E. C.*, *C. C.*, and *E. A.*, the burthen of the execution thereof. Replication, that *Reeves*, by his will, after bequeathing divers legacies to divers persons, gave all the residue of his personal estate to the said *E. C.* and *C. C.*, their executors, administrators and assigns, in equal shares; that *Reeves* did not by his will forgive the defendant the debt due to him upon the notes, and did not by his will, or by making the defendant one of the executors thereof, re-

lease or intend to release to the defendant the said debt; that the money in the notes mentioned remaining due and unpaid, the defendant, after the death of *Reeves*, and before the said indorsement of the notes to the plaintiff, to wit, on, &c., recognised and confirmed the notes as valid and subsisting, outstanding and unpaid, and paid to the said co-executors a certain sum of money, to wit, &c., as and for, and then and there being interest on the money in the notes specified; and that after the said payment of interest, the said *E. C.*, *E. A.*, and the defendant, indorsed the note in the first count mentioned, and the said *E. A.* indorsed the note in the second count mentioned, to the plaintiff, as in those counts respectively alleged. Demurrer (a) to the replication, and joinder in demurrer.

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*Campbell*, in support of the demurrer. The plea is an answer to both counts of the declaration, and the replication is no answer to the plea. The declaration charges the defendant as the maker of the note, but it nowhere alleges that *he* indorsed the note; for even the first count does not state that *the said (b) Edward Fox*, i. e. the defendant, was appointed executor. The replication, indeed, introduces the averment that *the defendant* indorsed the note, but if it is thereby intended to charge him as executor, the attempt is abortive, because the replication is a departure from the declaration. But, even if the first count were good, and contained a sufficient allegation that the defendant was indorser and executor, still the action cannot be maintained, because the payee of the note by appointing the maker his executor, extinguished the debt, and there remained no interest in the note which could be assigned by the executors. It was so held, with respect to a bond, in *Sir John Nedham's* case (c), where the distinction is taken between the effect of appointing a debtor executor, and of appointing him administrator, for

(a) The demurrer was special; but nothing turned upon the causes of demurrer assigned. (b) *Ante*, vol. i. 123, (a). (c) 3 Co. Rep. 135.



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it is there resolved, " that the committing of administration by the archbishop to the obligor, shall not extinguish the debt, but the debt remains; but if the obligee makes the obligor his executor, it is a release in law of the debt, for it is the act of the obligee himself, and therewith agrees 8 *Edw.* 4. 3. a, 21 *Edw.* 4. 2. b, &c." So, in *Wankford v. Wankford* (a), it was held, that if obligor is made executor to obligee, and administers some of the goods, but does not prove the will, and dies, the debt is extinguished; and the same distinction was there pointed out by *Powell, J.*, who said (b), " if the debtee makes the debtor and another his executors, although the debtor never administers, yet the action is lost for ever"—" if administration of the goods of the obligee was committed to the obligor, that was but a suspension of the action, and no extinguishment of the debt; but the reason of that is, because the commission of administration is not the act of the obligee, and so is 8 *Co.* 136, Sir *John Nedham's* case." So, in the modern case of *Cheetham v. Ward* (c), it was held, that if the obligee in a joint and several bond make one of two obligors his executor, with others, the action on the bond is discharged as to both obligors. Then, with respect to the second count, which charges an indorsement by one executor, although it was resolved in *Rawlinson v. Stone* (d), after much debate, that an administratrix might indorse a promissory note, still that count cannot be supported, because there is no authority for saying that an indorsement by one of several joint executors can have the effect of passing the interest, still less of rendering them all liable.

*F. Pollock*, contra. The defendant is liable upon this promissory note in the character either of maker or indorser. The doctrine relied on by the other side, that the appointment of a debtor as executor to the creditor operates as an extinguishment of the debt, does not extend to negotiable

(a) 1 *Salk.* 299.

(b) *Id.* 302, 303.

(c) 1 *B. & P.* 630.

(d) 3 *Wils.* 1.

instruments, and therefore does not apply to the present case; nor are the cases cited in support of the doctrine, authorities against the present plaintiff, because they are all cases of debts not transferable. That the debt is not wholly extinguished, not absolutely released, is plain; for in equity the executor is considered as a trustee of the amount for the payment of debts or legacies, *Berry v. Usher* (a): where a debtor having been appointed executor, although without a legacy, yet, it appearing from the tenor of the will, that the testator considered him in the light of a mere trustee of his whole property, his debt was clearly held not to be discharged. The real effect of the appointment is this, and no more, that the remedy by action is gone, which has given rise to the notion that the debt is absolutely released. Lord Coke, speaking upon this subject, says, "if the obligee make the obligor his executor, this is a release in law of the action, but the duty remains, for which the executor may retain so much goods of the testator" (b). Now, though, generally speaking, the action is gone, by means of the technical reason that an executor cannot maintain an action against himself or a co-executor, that does not apply to the present case, because here the right of action may by indorsement be vested in a third person; and *cessante ratione cessat lex*. Then as to the indorsement by one of the executors, that is clearly suffi-

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(a) 11 Ves. 87.

(b) Co. Litt. 264 b; upon which Mr. Butler, in his note (209), says, "A debt is only a right to recover the amount of the debt by way of action; and as an executor cannot maintain an action against himself, or against a co-executor, the testator, by appointing the debtor an executor of his will, discharges the action, and consequently discharges the debt. Still, however, when the creditor makes the debtor his executor, it

is to be considered but as a specific bequest or legacy, devised to the debtor to pay the debt, and therefore, like other legacies, it is not to be paid or retained till the debts are satisfied; and if there are not assets for the payment of the debts, the executor is answerable for it to the creditors." And they refer to *Wankford v. Wankford*, 1 Salk. 299; *Selwin v. Brown*, 3 Bro. P. C. 179; Fort. 243; 8 Vin. Abr. 607; 2 Eq. Cas. Abr. 461, note at (Q).

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cient to bind them all. The interest of all the executors is entire. The act of one would be sufficient to release a debt, or to convey a term of years; therefore it is sufficient to transfer the property in a promissory note. Besides, this objection applies only to the second count, and upon the grounds already mentioned the first count is sustainable.

The Court took time to consider of their judgment, which was afterwards delivered by

Lord TENTERDEN, C. J., who, after stating the pleadings, thus proceeded:—It was contended on the part of the defendant, that by the appointment of the maker of the note to the office of executor of the payee, the note was discharged; so that an indorsement, even by the maker himself, could not revive it, and render it a binding instrument: and we are of that opinion. The language adopted in the cases of *Wankford v. Wankford* (a) and *Cheetham v. Ward* (b), upon this point, is, that the debt is discharged. The note, in such cases, is considered as having been paid by the executor to himself, and the amount is treated as assets in his hands; and upon that ground it is, that the courts of equity hold the executor liable for the amount of his debt as assets. Upon the authority of these cases, and the principle deducible from them, that the debt is discharged, we are of opinion that the defendant is entitled to the judgment of the Court.

Postea to the defendant.

(a) 1 Salk. 299.

(b) 1 B. & P. 630.

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The KING v. the Company of Proprietors of the Navigation  
of the River AVON.

BY a rate made for the relief of the poor of the parish of Keynsham in the county of Somerset, the defendants, the company of proprietors of the navigation of the river Avon, from Hannam Mills to the city of Bath, were rated in the aggregate sum of 2*l.* 10*s.* upon an annual value of 100*l.*, for or in respect of a lock, sluice, cut, *and land covered with water, being part of the river Avon in the same parish*, and for profits arising from the same by carriage of merchandize and persons thereon, being a proportionate part of the tolls collected and received in respect of merchandize and persons carried on the river Avon, from and to Hannam Mills to and from the city of Bath. On appeal, the sessions amended the rate by striking out the words "*and land covered with water, being part of the river Avon in this parish*," and by altering "100*l.*" to 5*l.*, and "2*l.* 10*s.*" to 2*s.* 6*d.*, subject to the opinion of this Court upon the following case.

The river Avon was made navigable soon after the passing of the 10 *Ann.* c. 8, entitled "An Act for making the River Avon in the Counties of Somerset and Gloucester navigable from the City of Bath to or near Hannam Mills," and was so made under the authority of that act by the proprietors of the navigation, the predecessors of the appellants (*a*). By the 47 *Geo.* 3, entitled "An Act for and lock for the purposes of the navigation, on land purchased by them:—Held, that they were not the occupiers of the river Avon, and not ratable in respect of it as land covered with water; but that they were ratable in respect of the cut and the lock made on their own land.

An act of parliament authorised certain persons to make and maintain the river Avon navigable, to scour the river, to make new cuts through lands adjoining, and to build locks, first making satisfaction to the owners of lands. The act then appointed commissioners for settling and apportioning such satisfaction; and then empowered the undertakers to take certain tolls. The undertakers made the river navigable, and scoured and cleansed it from time to time, and made a cut

(*a*) The 10 *Ann.* c. 8, s. 1, enacted, that the mayor, aldermen, and common council of the city of Bath, their successors and assigns, or such person or persons as they should nominate and appoint,

should be and they were thereby authorised, at their proper costs and charges, to make the river Avon (from the city of Bath, down into and within the mill pool or weir pool below Hannam Mills and weir, not

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enabling the Proprietors of the Navigation of the River Avon, in the Counties of Somerset and Gloucester, from

exceeding 150 yards) navigable for boats, lighters, and other vessels; and from time to time to continue, maintain, and use such navigation in such manner, and also by, through and upon such passages and watercourses into the said river as they should think fit; and for those purposes to clear, scour, open, enlarge, or straighten and restrain the said river from the place aforesaid, or any other streams, brooks, or watercourses, which came or might be brought into the same; and to dig, open, or cut the banks of the river, or any other the streams, brooks, or watercourses aforesaid; and to make any new cuts, trenches, or passages for water, in, upon, and through the lands or grounds adjoining, or near unto the river, streams, brooks, or watercourses, as they should think fit and proper for navigation of boats, &c., or any ways necessary for the more convenient carrying on and effecting the said undertaking, being the soil or ground of her majesty, or of any other person or persons, &c.; and to remove all trees and other obstructions which might hinder the navigation, either in sailing or haling of boats, lighters, &c. upon the river, brooks, &c.; and to build and make over or in the river, streams, &c., or upon the lands adjoining or near the same, or any of them, such bridges, sluices, or other works as and where they the undertakers and their successors should think fit, and to alter, repair, and amend

the same; and to make any ways, passages, &c. for the carrying commodities, goods, and all other things to and from the river, navigable passages, &c., and for carrying all manner of materials for erecting the said works, and for altering the same, and to lay the materials on the ground, near the places where the works should be made or done; and to amend, heighten, or alter any bridges, or to turn or alter any highways in or upon the river, streams, &c., as might hinder the navigation thereon; as also to set out and appoint towing-paths for haling or drawing of boats, &c., passing upon the river, streams, &c., as the said undertakers and their successors should think convenient; and to do all other matters and things which the said undertakers, their assigns and nominees, should think necessary for making and maintaining the river, streams, &c., navigable as aforesaid, or for the improvement or preservation thereof, the said undertakers, their successors or assigns, first giving satisfaction to the owners or proprietors of such lands, tenements, or hereditaments respectively, as should be dug, cut, or removed, or otherwise made use of for pathways, or for carrying on and effecting the said navigation, or maintaining the same according as was thereafter by that act provided for and appointed.

Sect. 2, appointed certain persons, therein named, commissioners for settling any difference that

the City of Bath to or near Hannam Mills, to make and maintain a horse towing-path for the purpose of towing and hawling with horses, or otherwise, boats, lighters, and other vessels up and down the said River;" further powers were given to the said proprietors (*a*). The river has conti-

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might arise between the undertakers, &c. and the proprietors of the said lands, &c.; and empowered them to settle and determine what satisfaction every such person should have for such proportion of his lands, &c. as should be cut, dug, removed, or made use of as aforesaid, and for the damage that should be thereby sustained; and to adjust and settle what share and proportion of such *purchase-money* or satisfaction every tenant or other person having a particular estate, term, or interest in any of the premises, should have for his respective interest or right.

Sect. 4 enacted, that in consideration of the charges and expenses the undertakers, &c. would be at not only in making the river navigable, but also in repairing and keeping up the said works, locks, &c., it should be lawful for them at all times thereafter to demand, receive, and take for their own proper use and benefit in respect of their charges and expenses aforesaid, for all and every passenger, goods, &c. that should be carried down the said river from the city of Bath to Hannam Mills, the rates and duties thereafter mentioned.

Sect. 12 reserved to the lords, owners, or proprietors of all royalties or liberties of fishing or fowling in the river, their respective rights of fishing or fowling in the same.

Sect. 15 enacted, that in case the undertakers of the navigation should not, when occasion required, sufficiently repair and amend all defects and decays that should happen to the locks erected by virtue of the act, or within four days after notice given to them to do the same, it should be lawful for the proprietors or possessors of the weirs and mills adjoining to such locks to repair the same.

(*a*) The 47 Geo. 3, after reciting the 10 Ann. c. 8, the appointment of nominees to execute the works, and that such nominees had proceeded to purchase lands, &c., and to make the navigation and works, and to carry on the same under the rules and regulations of the recited act, and that the tolls arising from the navigation, together with the locks and other works belonging to the same, had become vested in the company of proprietors of the Kennett and Avon Canal Navigation, enacted, that it should be lawful for the said company to make towing-paths for drawing with horses, &c. any boats or other vessels navigating thereon, between Bath and the mill pool and weir, below Hannam Mills and weir, not exceeding 150 yards; to purchase lands for that purpose; and upon payment or tender of the money agreed upon for the purchase of such lands, immediately to enter upon such lands.

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nued to the time of making the rate navigable and navigated, and the proprietors have received the tolls, rates and duties given by the acts, or either of them, from all passengers and goods passing on the river. No part of the towing-path mentioned in the act of the 47 *Geo.* 3, is within the parish of Keynsham. A certain cut was, before the passing of the 47 *Geo.* 3, made in the respondent parish as part of the river, and a certain lock within that parish and in that cut was at the same time constructed at the expense of the proprietors for the purposes of the navigation, and under the provisions of the act of 10 *Ann.*; and both have been and still are used for the same purposes by persons paying tolls, rates and duties to the proprietors. The proprietors have and still do under the powers of the act of 10 *Ann.* from time to time, as need requires, clear, scour and cleanse the bed of the river. The clear annual amount of the tolls, rates and duties, received by virtue of the act of 10 *Ann.* on the navigation, which is eleven miles in length, is 4000*l.* per annum. The length of the river in the respondent parish is three miles; the length of the cut in that parish is 300 yards. No specific toll, rate, or duty, is payable for passing the lock or cut. For the purposes of the tolls, rates and duties, the cut and lock are parts of the navigation of the river. The cut and lock are substituted for the natural river. None of the appellants reside within the respondent parish. The question for the opinion of the Court is, whether the appellants are ratable for the whole or any part of the subject-matter of the rate. If the Court shall be of opinion that the whole is ratable, the rate to be confirmed. If they shall be of opinion that the cut and lock only are ratable, the rate to be amended by reducing the annual value to 5*l.*, and the amount of assessment to 2*s.* 6*d.* If they shall be of opinion that the lock only is ratable, the rate to be amended by reducing the annual value to 2*l.* 10*s.*, and the amount of the assessment to 1*s.* 3*d.* If they shall be of opinion that no part is ratable, the rate to be quashed.

This case was first argued at the sittings in banc before the last term, when the Court took time to consider of their judgment. They afterwards directed the case to be re-argued before the whole Court, which was done accordingly in the early part of the present term.

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*Jeremy and Moody* in support of the rate. The rate is good to the extent of its whole subject-matter. The company need not be the owners of the banks and bed of the river in order to their being ratable in respect of the profits; it is sufficient if they are the occupiers: and that they clearly are, for the case finds as a fact that they have scoured and cleansed the bed of the river, an act which would in an ordinary case be of itself sufficient evidence, not only of occupation, but even of possessory title. But if that act must be taken to have been done merely in the exercise of the powers vested in the company by the acts of parliament, still enough appears from them to shew, that the company are the owners of the soil of the river. The first section of 10 Ann. c. 8, authorises the undertakers and their successors to clear, scour, open, enlarge, or straighten the river; to dig, open, or cut the banks; to make new cuts for water through the lands adjoining the river; to remove trees and other obstructions; to make over or in the river, or upon the adjoining lands, bridges, sluices, and other works; and to do all things necessary for making and maintaining the river navigable: first giving satisfaction to the owners of such lands as shall be made use of for the purpose of maintaining the navigation. By the second section, commissioners are appointed for settling differences between the undertakers and the proprietors of such lands, and they are empowered to settle what proportion of the *purchase-money* every person having a particular estate or interest in any of the premises shall have for his respective estate or interest. That is in effect giving the company power to purchase lands, in which respect this act of parliament differs from the 16 & 17



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*Car. 2, c. 12*, passed for making the river Itchin navigable; for that act contained no clause giving the undertakers power to purchase lands, nor did it recognise in them any right of soil in the bed or banks of the river; and that was one of the grounds upon which the decision in the case of *Hollis v. Goldfinch* (a) proceeded. It was there held, that the undertakers could not maintain trespass for an injury done to the bank of the river; here the company clearly might maintain trespass for any injury done to the bed or banks of the river: therefore, they must be in the possession, or at least in the occupation, of the river. The fifteenth section of the 10 *Ann. c. 8*, enacts, that in case the undertakers of the navigation shall not sufficiently repair and amend all decays which shall happen to the locks within four days after notice given to them to do the same, it shall be lawful for the proprietors or possessors of the weirs and mills adjoining to such locks to repair the same. The right of entry given in that particular case necessarily implies the exclusion of that right in all other cases, and shews that the legislature considered the company as the owners of the locks. By the 47 *Geo. 3*, reciting the 10 *Ann. c. 8*, and the appointment of nominees to execute the works, and that such nominees had proceeded to purchase lands and hereditaments, and to make the navigation and works, and to carry on the same, and that the tolls and locks arising from and belonging to the same had become vested in the company, it is enacted, that it shall be lawful for the company to make towing-paths, and to purchase lands for that purpose, and upon payment or tender of the money agreed upon for the purchase of such lands, immediately to enter upon such lands. The company, therefore, are the owners of the navigation, and the case finds expressly, that they have from time to time cleansed and scoured the bed of the river. That is of itself sufficient evidence of occupation, and gives the company a possessory title; therefore, they are the occupiers of the bed of the river, and might

(a) 2 D. & R. 316; 1 B. & C. 205.

maintain trespass in respect of it. They have an interest in the realty: *Buckeridge v. Ingram* (a). [Bayley, J. If that case applies at all, it shews that the soil did not pass.] But it shews that an interest in the soil did pass. In *Rex v. Palmer* (b), and *Rex v. The Earl of Portmore*, (c), it was admitted without argument, that the proprietors of a river navigation were ratable in respect of such interest in the bed of the river. But even if the company have not such an interest in the soil as would enable them to maintain trespass, they are nevertheless ratable in respect of their profits; they are ratable as the beneficial occupiers of land locally situate within the parish, *Rex v. Cardington* (d), *Rex v. The Aire and Calder Navigation* (e), *Rex v. Macdonald* (f), *Rex v. The Trent and Mersey Navigation* (g), *Rex v. The Birmingham Gas Company* (h), *Rex v. The Brighton Gas Company* (i), *Rex v. Bath* (k), *Rex v. The Rochdale Water-works* (l), *Atkins v. Davis* (m). In *Rex v. Liverpool* (n), and *Rex v. The Trustees of the Weaver Navigation* (o), the parties were held not to be ratable, because the tolls were applicable to public purposes, which was in conformity with a prior decision in *Rex v. Salter's Load Sluice Navigation* (p); and in the *The Duke of Newcastle v. Clarke* (q), it was held, that the commissioners of sewers could not maintain trespass, because they merely exercised an authority on behalf of the public, which vested no property or possessory interest in themselves:

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| (a) 2 Ves. jun. 652.         | (i) 8 D. & R. 308; 5 B. & C.           |
| (b) 2 D. & R. 793; 1 B. & C. | 466.                                   |
| 546.                         | (k) 14 East, 609.                      |
| (c) 2 D. & R. 798; 1 B. & C. | (l) 1 M. & S. 634.                     |
| 551.                         | (m) Cald. 315. And see the             |
| (d) Cowper, 581.             | cases collected in <i>Rex v. The</i>   |
| (e) 2 Term Rep. 660.         | <i>Trent and Mersey Navigation</i> , 2 |
| (f) 12 East, 324.            | D. & R. 755, n.                        |
| (g) 2 D. & R. 752; 1 B. & C. | (n) 7 B. & C. 61.                      |
| 545.                         | (o) 7 B. & C. 70, n.                   |
| (h) 2 D. & R. 735; 1 B. & C. | (p) 4 Term Rep. 730.                   |
| 506.                         | (q) 8 Taunt. 602; 2 Moore, 666.        |

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those cases, therefore, are none of them authorities to affect the present.

*Campbell, Rogers, and Bere, contra.* The 47 *Geo.* 3 has no bearing upon the question, because the case finds that no part of the towing-path mentioned in that statute is within the parish of Keynsham; and confining the question to the 10 *Anne*, c. 8, it is clear that the company are not ratable either for the land covered with water, the locks, or the sluice. First, they are not ratable for the land covered with water, being part of the river Avon, because they are not occupiers of that land within the meaning of the 43 *Eliz.* c. 2, not being in the actual occupation of the soil of the river. The 10 *Ann.* c. 8, gives the company no interest either in the soil or the water; nor does it give them even the right to use the water in any more ample degree than they originally possessed as part of the public, or than the rest of the public still possess. Their interest most resembles that of trustees of a turnpike-road, though with this difference, that trustees of roads have no interest in the tolls, whereas the tolls are by the fourth section of the act granted to this company, in consideration of their charges and expenses in making the river navigable, and keeping the locks in repair. Toll taken upon a river navigation, and toll taken upon a canal, are essentially different; the one is in the nature of toll thorough: the other is strictly speaking toll traverse. Here the company are authorised to take toll of those who pass over the soil of the river, which belongs to third persons, and along the river itself, which is a public highway; the toll, therefore, is in the nature of a toll thorough, because the owners of it claim no interest in the soil, but take it in consideration of cleansing and keeping open the navigation: a consideration which would be sufficient at common law, *Lord Pelham v. Pickersgill* (a). But toll taken upon a canal requires no consi-

(a) 1 T. R. 660.

deration (a), for it is "a payment of a sum of money for passing over the private soil of another," as defined in the case of *Heshord v. Wills* (b); and the proprietors of a canal which they have cut through their own land may demand toll of those that use it, without shewing any consideration to support the demand. In respect of the profits arising from their tolls, therefore, the company are not liable to be rated, because toll thorough is not ratable, though toll traverse is. Then, except the right of taking toll, which is not an interest in the soil, the company have really no interest at all. The act of parliament gives them no interest in the soil; they could not maintain trespass for any injury done to the soil: consequently, they are not ratable as occupiers of the soil. That is the only true criterion of ratability in respect of land. "A party," said *Lawrence, J.* in *Rex v. Watson* (c), "if ratable at all in respect of land, must be rated as occupier; occupation, properly speaking, is possession, and trespass can only be brought by him who is in possession of the land:" and observations of a similar nature were made by *Le Blanc, J.*, in *Rex v. Ellis* (d), and by *Holroyd, J.*, in *Rex v. The Mayor of Sudbury* (e). But it has been said that the company could maintain trespass for an injury done to the soil of the river, and that, consequently, they are ratable as the occupiers. Now, until the passing of the statute of *Anne*, the soil in the river must have been in some other persons as the occupiers, who were, as such, entitled to maintain trespass for any injury done to it. But the statute has made no alteration in this respect; it has not taken away the bed of the river, or the mines beneath it from their former owners; it has merely

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(a) To support a claim of toll traverse, a special consideration need not be shewn, *Richards v. Bennett*, 2 D. & R. 389; 1 B. & C. 223; but a claim of toll thorough cannot be supported without shewing a beneficial consideration moving to the person of

whom it is claimed. *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402; *Hill v. Smith*, 4 Taunt. 520.

(b) 1 Sid. 454; 1 Mod. 48.

(c) 5 East, 487.

(d) 1 M. & S. 664.

(e) 2 D. & R. 651; 1 B. & C. 395.

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conferred upon the company certain rights to be exercised in the soil of other persons: the former owners, therefore, still continue entitled to the soil, subject only to an easement granted to the company, and may still maintain trespass for any injury done to the soil. But that easement may not extend over the whole bed of the river. It is a right of entry for the purposes of maintaining the navigation, as scouring, cleansing, enlarging, or narrowing the course of the river; but there may have been portions of the river which have never required either scouring, cleansing, enlarging, or narrowing; and if so, the company have never had any right of entry upon those parts, and would be liable to an action by the original owners of the soil if they entered there, or upon any other part of the river, unnecessarily, or for any purpose not specified in the act of parliament. Then, if the original owners of the bed of the river can maintain trespass against a wrong-doer, it is quite clear that the company, who have merely an easement therein, cannot; and if so, they are not the occupiers so as to be ratable, for it has been expressly decided that a mere easement in the soil of another is not ratable. *Rev. v. Jolliffe (a)*. It might as well be said that the owner of a ferry is, as such, the owner of the soil, as that this company are, in respect of their right of entry, the owners of the bed of the river. He has a right to use the water in crossing the river, and if the owner of the soil were to infringe that right by diverting the water, he would be guilty of a tort, and would be liable to an action on the case by the owner of the ferry; but still the owner of the ferry has no interest in the soil of the river, nor have the company in the soil of this navigation. The general rule is, that trespass is only maintainable for injuries to corporeal hereditaments in possession. The only exceptions to that rule are a free warren and a several fishery; and with respect to the latter of those, it has been much doubted whether it can exist dis-

(a) 2 T. R. 90.

inct from the property in the soil. *Seymour v. Lord Courtenay* (a); *The Duke of Somerset v. Fogwell* (b). But passing over that doubt, the principle upon which the owners of those franchises may maintain trespass in respect of them is, that they have the exclusive possession, without which no man can maintain trespass. The plaintiff in trespass must have an interest in the *lund*, *Challenor v. Thomas* (c), where it was held that ejectment does not lie for a watercourse, and where the Court said, "The action ought to be for so many acres of land covered with water. But if the land under the river or water does not belong to the plaintiff, but the river only, then, on a disturbance, his remedy is only by action on the case on any diversion of it, and not otherwise." It is the same with respect to the owner of the tolls of a market; his right is analogous to that of the company in this case; but the lessee of market tolls, not being the owner of the soil, is not ratable to the poor as an occupier of a tenement, *Rex v. Bell* (d). The

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(a) 5 Burr. 2814.

(b) 8 D. & R. 747; 5 B. & C. 875. In the latter case *Bayley, J.* said, "Does a several fishery necessarily imply an ownership of the soil, or may it exist independently of it? Upon that point much legal discussion has taken place; but when I consider the nature of the franchise itself, and the law with respect to fisheries in rivers generally, I have no hesitation in saying that, in my opinion, this\* was not a territorial or corporeal hereditament, but a merely incorporeal franchise." His lordship then quoted a passage from Co. Litt. 4 b, which see, and added, "Now that supposes

a grant made by the owner of the soil, capable of granting the soil, and yet shews that a grant of a several fishery, though followed up by livery, which applies only to what is corporeal, would not convey the soil, the livery being made if nothing is granted but a fishery, *secundum formam chartæ*. Then nothing passes to the grantee but a right to take the fish; he acquires no property either in the water or in the soil." 8 D. & R. 754, 755.

(c) Yelv. 143; Gouldsb. & Brownl. 143.

(d) 5 M. & S. 221. And see *Rex v. Mosley*, 3 D. & R. 385; 2 B. & C. 227.

\* The franchise in that case was a several fishery in a navigable river, where the tide ebbed and flowed,

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mere use of land, even though sole and exclusive, does not give the party a right to maintain trespass. Thus trespass will not lie for the disturbance of a right to sit in a pew; *Dawtrie v. Dee* (a); *Stocks v. Booth* (b); nor for the infringement of a right of common, or the disturbance of a private right of way, because it is a damage done to a privilege, liberty, or easement, which one man has in the soil of another, for which he cannot bring trespass, though he may have an action on the case. *Com. Dig. Trespass, D.* But the company here have not the sole and exclusive use of the river, but a limited use only, which, at all events, would not support trespass. Thus commissioners of sewers, having only an authority to be exercised for the benefit of the public, which vests no property or possessory interest in themselves, cannot maintain trespass. *The Duke of Newcastle v. Clarke* (c). Many other instances of a similar kind might be mentioned. The case of *Buckridge v. Ingram* (d), which has been cited on the other side, is a decisive authority to shew that the company here have no interest in the soil, but a mere easement over it. The powers given to the undertakers in the case of *Hollis v. Goldfinch* (e), cannot be distinguished from those conferred upon the company in this case; yet there it was held that the proprietors had no interest in the soil, and could not maintain trespass for an injury done to it. The river Avon, like other navigable rivers, is common to all the King's subjects; it is a public highway; *Vin. Abr. Chemin, A.*; and no individual can have the exclusive ownership or occupation of it. In *Rex v. The Severn and Wye Railway Company* (f), where a railway was made under the authority of an act of parliament, by which the proprietors were incor-

(a) 2 Roll. Rep. 139; Palmer, 46.

(b) 1 T. R. 428. See all the authorities upon this point collected in *Byerley v. Windus*, 7 D. & R. 564; 5 B. & C. 1.

(c) 8 Taunt. 602; 2 Moore, 606.

(d) 2 Ves. jun. 652.

(e) 2 D. & R. 316; 1 B. & C. 205.

(f) 2 B. & A. 646.

porated, and it was provided that the public should have the beneficial enjoyment of the railway; and the company afterwards took up the railway: it was held, that a mandamus might issue to the company to reinstate the railway. In this case the company must be considered as mere trustees for the public, like commissioners of sewers or trustees of a turnpike road, and as such it is quite clear that they have no interest or occupation in respect of which they can be rated to the relief of the poor. The arguments above addressed to the land covered with water, are equally applicable to the cuts and the sluices. The company have only the right of making cuts through the soil of other persons; and that gives them no interest in the soil. It is the same also with respect to the sluices, which cannot be distinguished from sluices made by commissioners of sewers.

The Court took time to consider of their judgment, which was now delivered by

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Lord TENTERDEN, C. J.—The rate in dispute in this case was assessed upon locks, a sluice, and land covered with water, and the profits arising therefrom. On appeal, the Court of Quarter Sessions amended the rate by striking out the words “land covered with water.” The question in this case was precisely the same as that in the case of *The King v. The Company of Proprietors of the Mersey and Irwell Navigation*, decided this term (a). In that case we were of opinion that the land covered with water was not in the occupation of the proprietors of the Mersey and Irwell navigation, and therefore that they were not liable to be rated to the relief of the poor in respect of the same. In this case, upon the same ground, we are of opinion that the proprietors of the navigation of the river Avon are not the occupiers of the land covered with water, being part of the river Avon, and are not liable to be rated to the relief of the poor in respect of the same; and, consequently, that

(a) *Post*.



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the Court of Quarter Sessions did right in amending the rate by striking out of it the words, "land covered with water, being part of the river Avon." We concur with the Court of Quarter Sessions in deciding that the cut or navigable canal, which was actually made by this company upon land purchased by them, and the lock which they have erected on such land, are, according to all the authorities, fit subjects to be rated to the relief of the poor; and this our opinion being conformable with that of the Court of Quarter Sessions, the effect is, that the rule for setting aside the order of that Court must be discharged.

Order of Sessions affirmed.

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*Mandamus* to the mayor and aldermen of London, to admit *A.* into the office of alderman. Return, that by certain proceedings (set out) had at a court of wardmote, *A.* was declared elected; that a return thereof was made to the court of mayor and aldermen; that that court has from time immemorial had cognizance to adjudge upon all elections at wardmote courts to city offices, upon petition by any person interested; that persons interested petitioned against the return of *A.*; that the court of mayor and aldermen, upon inquiry, declared the election void; and that *A.* was not duly elected. Traverse, that *A.* was not duly elected, and issue. Proof, that at the election three poll clerks were first appointed, and two of them afterwards dismissed; that upon a scrutiny being demanded the wardmote was adjourned "to meet again on a fresh summons;" that the mayor then went out of office, and the new mayor assembled a wardmote by a fresh summons, took the scrutiny, and declared *A.* duly elected; and that a return thereof being made to the court of mayor and aldermen, they, upon petition, declared the election void. Special case stating the above facts. —Held, first, that the return was good in form; secondly, that the claim of cognizance by the court of mayor and aldermen did not exclude the jurisdiction of the Court of *K. B.*; thirdly, that the dismissal of the poll clerks, and the change of the mayor, were no objections to the validity of the election; and fourthly, that the mode of adjourning the wardmote was not a dissolution, and did not affect the proceedings at the scrutiny.

*R. C. Glynn, &c.* We, the mayor and aldermen of the city of London, mentioned in the writ hereto annexed, do humbly certify and return to our Sovereign Lord the King, in the Court of our said Lord the King, before the King himself at Westminster, at the time in the said writ mentioned, that the city of London is, and from time whereof the memory of man is not to the contrary, hath been an ancient city, and that the citizens and freemen of the said city during all that time have been a body politic and corporate in deed, fact, and name, by divers names of incorporation, and that they are now a body politic and corporate by the name of "the mayor and commonalty and citizens of the city of London;" and that within the said city from time whereof, &c., there of right have been, and still are, divers wards, and, among others, the said ward of Vintry in the said writ mentioned, and divers citizens and freemen of the said city, who have been, and have been called, aldermen of the said city; and that the office of an alderman of the said city for and during all the time aforesaid hath been and still is a public office, and an office of great trust and pre-eminence within the said city, touching the rule and government thereof; and we, the mayor, &c., do further humbly certify and return, that from time whereof, &c., there of right hath been and still ought to be, within the said city, a certain court of record, called the court of mayor and aldermen of the said city of London, holden in the Guildhall of and within the said city, according to the custom of the said city, before the mayor of the said city for the time being, or his locum tenens, and the aldermen thereof, or at least twelve others of the said aldermen, at such times as hath seemed meet and necessary to the mayor of the said city for the time being, upon due notice previously given thereof, according to the custom of the said city, for (among other things) the consulting about and transacting lawful and necessary affairs concerning the good government of the said city. And we, the said mayor, &c., do further humbly certify, &c., that from time whereof, &c., certain assemblies or courts, called wardmote courts, have

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been of right holden from time to time on divers days in each of the said wards within the said city respectively, for (among other things) the election of divers persons into divers offices and places in the said city, by virtue of precepts issued for such elections respectively; to which respective precepts returns during all that time have been made, and of right ought to have been made, and still of right ought to be made into the said court of mayor and aldermen, and that the said court of mayor and aldermen, holden as aforesaid, according to the custom of the said city, from time whereof, &c., hath had, and of right ought to have had, and still of right ought to have *the cognizance, jurisdiction and authority of examining, hearing, determining and adjudging of and concerning the election and return of every person elected into any place or office within the said city, at any such wardmote court holden as aforesaid*, whensoever the merits of any such election or return have been brought into question by the petition of any person interested therein, to the said court of mayor and aldermen holden as aforesaid. And we, the said mayor &c., do further certify, &c., that from time whereof, &c., there hath been, and still of right ought to be within the said city a certain court or assembly called the court of common council, holden before the mayor or his locum tenens, and the aldermen of the said city for the time being, and the commons of the said city, or the major part of them, duly elected and chosen according to the custom of the said city in that behalf, being assembled together upon reasonable summons thereof previously given according to the custom of the said city; which said commons of the said city so elected as aforesaid, together with the mayor, or his locum tenens, and aldermen aforesaid, during all the time aforesaid, have been the common council of the said city, to consult of and upon all matters and things proposed in common council concerning the said city, and to give and declare their assent and dissent as well for themselves as for the rest of the commonalty and citizens of the said city; and that the

said mayor, or his locum tenens, aldermen, and commons, or the major part of them, so assembled in common council, during all the time aforesaid have been used and accustomed, and have had and still have a right to make, constitute and appoint such reasonable ordinances, acts and bye laws, as to them seemed meet for the better government, order, and regulation of the said city. And we, the said mayor, &c., do further certify, &c., that from time whereof, &c., until the making and passing of a certain bye law or act of common council, duly made at a court of common council duly holden in the said city, according to the custom of the said city, on the 1st August, 21st *Richard 2*, touching the election of aldermen for the said city, whereby it was ordained that, for the future, in the elections of aldermen, two, at least, honest and discreet men should be chosen and presented to the mayor and aldermen, so that either of them whom they should chuse might be admitted and sworn; and also after the making and passing of a certain other bye law or act of common council, duly made at a court of common council, duly holden in the said city, according to the custom of the said city, on the 15th April, 13th *Ann.* touching the election of aldermen of the said city, entitled "An Act for reviving the ancient manner of electing aldermen," whereby, after reciting (among other things) that by the ancient usage and custom of the city of London, when any ward of the said city became vacant and destitute of an alderman, the inhabitants of that ward, having a right to vote in such elections, were wont to chuse one person only, being a citizen and freeman of the said city, to be alderman of the same ward, for reviving the said ancient custom and restoring to the said inhabitants their ancient rights and privileges of chusing one person only to be their alderman, it was enacted, "that from thenceforth, in all elections of aldermen of the said city, at a wardmote to be holden for that purpose, there should be elected, according to the said ancient custom, only one able and sufficient citizen and freeman of the said city, not being an alderman, to be

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returned to the court of mayor and aldermen as therein mentioned ;" as by such bye law or act of common council may more fully appear ; and from thence hitherto the aldermen of divers wards of the said city, and, among others, of the ward of Vintry, have of right been elected and chosen at such wardmote courts as aforesaid, holden as aforesaid in the respective wards, by virtue of such precepts as aforesaid, one alderman for each ward. And we, the said mayor &c., do further certify, &c., that a vacancy having occurred in the place and office of an alderman of the ward of Vintry aforesaid by the death of *Christopher Magnay*, Esq., late alderman thereof, a court of wardmote was holden on Thursday the 2d November, 1826, and by adjournment on other subsequent days, in and for the said ward of Vintry, before the Right Honorable *William Venables*, then mayor of the said city, by virtue of a precept for that purpose before then duly issued, according to the custom of the said city, for the election of an alderman of the said ward in the room and stead of the said *Christopher Magnay*, at which court of wardmote divers persons, being then present, voted for the said *Henry Winchester* as and for such alderman, and the said *Henry Winchester* by reason thereof claimed to be duly elected into the said office or place of alderman so vacant as aforesaid, and a return to the said precept was afterwards, on the 18th December, 1826, made into the said court of mayor and aldermen, then duly holden in the Guildhall of the said city, according to the said custom as aforesaid ; and it was by the return thereof stated to the said court that the said *Henry Winchester* was duly elected alderman of the said ward. And we, the said mayor, &c., further certify, &c., that *Edward Archer Wilde*, a citizen and freeman of the said city, and candidate at the said election at the said wardmote court, and being a person interested in the said election, and also other persons being interested in the said election, presented petitions to the said court of mayor and aldermen on the said 19th December, 1826, complaining of the said election, and touching the merits of the said election, and praying that

the same might be declared null and void by the said court; whereupon the said court of mayor and aldermen adjourned the consideration of the said petitions until the 28th December, 1826, on which day the court of mayor and aldermen, being then and there duly holden in the Guildhall of the said city, according to the said custom, took the said petitions into consideration, and having heard the said petitioners and the said *Henry Winchester* by their respective counsel, touching the said election, did, according to the said ancient custom, examine, determine and adjudge of and concerning the said election so brought into question by the said petitions; and due deliberation being thereupon had, did adjudge and determine the said election to be null and void, and did order and direct a precept to be issued for another election of an alderman for the said ward of Vintry in the room of the said *Christopher Magnay* deceased. And we, the said mayor, &c., do further certify, &c. that the said *Henry Winchester* was no otherwise elected into the said place and office than as hereinbefore mentioned. And we, the said mayor, &c., further certify, &c., that the said *Henry Winchester* was not duly elected into the place and office of alderman of the said ward of Vintry, in the said city, as by the said writ is supposed and suggested; and for these reasons and causes we, the said mayor, &c., cannot admit and swear, nor ought we to admit and swear the said *Henry Winchester* into the said place and office of alderman of the ward of Vintry aforesaid, as by the said writ we are commanded.

And, thereupon, on the same Friday next after the morrow of the Holy Trinity, before our said Lord the King at Westminster, came as well the said *Henry Winchester* in the said writ and return named, by *Charles Francis Robinson* his clerk in court, as the said mayor and aldermen of the said city of London, in the said writ and return named, by *Peregrine Deaktry* their clerk in court; and the said *Henry Winchester* having heard the said writ and return read, protesting that the said return and the matters

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therein contained are insufficient in law to bar and preclude him from having a peremptory writ of mandamus in this behalf, for plea the said *Henry Winchester*, by force of the statute in such case made and provided, saith, that he, the said *Henry Winchester*, was duly elected into the place and office of alderman of the said ward of Vintry in the said city, in manner and form as in the said writ is suggested, and the said *Henry Winchester* prays that this may be inquired of by the country. Similiter by the defendants.

At the trial, before Lord *Tenterden*, C. J., at the adjourned sittings at Westminster after last Hilary term, a verdict was found for the crown, subject to the opinion of this Court upon the following case.

A vacancy having occurred in the office of alderman for the ward of Vintry in the city of London, by the death of *Christopher Magnay*, Esq. the Right Honorable *William Venables*, then lord mayor of the city of London, duly issued his precept on the 28th October, 1826, for holding a wardmote in order to supply such vacancy. That precept was as follows:—

“To the common councilmen of the ward of Vintry in the city of London. These are to require you to cause a wardmote to be duly summoned and held before me, the Right Honorable *William Venables*, lord mayor of the city of London, at Cutlers’ Hall in the said ward of Vintry, on Thursday next, the 2d of November, 1826, at half past two of the clock in the afternoon of the same day, for the choice of a fit and able person to be alderman of the said ward, in the room and stead of *Christoper Magnay*, Esq., deceased. Hereof fail not.”

Under this precept a wardmote was duly held on the 2d November, 1826, at Cutlers’ Hall, for that purpose, when three candidates were duly proposed for that office: viz. *Henry Winchester*, Esquire, citizen and cutler; *Edward Archer Wilde*, Esquire, citizen and dyer: and *Thomas Crook*, Esquire, citizen and cordwainer. A poll was duly demanded and granted, and the lord mayor appointed three poll clerks

for taking the votes at that election, *Ralph Richardson*, *Thomas Watts* and *William Peacock*. These persons were duly sworn, pursuant to 11 Geo. 1, c. 18, s. 1, to take the poll, and each was provided with a book for the purpose of entering therein such polls as should be taken by such respective clerks. On the 2d November, 1826, only three persons were admitted to vote. One of these, *George Dickens*, voted for *Henry Winchester*, Esq.; his vote was duly taken by *William Peacock* in his poll book. *John King* voted for *Edward Archer Wilde*, Esq.; his vote was duly taken by *Thomas Watts* in his poll book. *Richard Shepherd* voted for *Thomas Crook*, Esq.; and his vote was duly taken by *Thomas Watts* in his poll book. No votes were taken by *Ralph Richardson* on the 2d November.

At the close of the poll on the 2d November, 1826, the poll books were all duly sealed up by the lord mayor, pursuant to 11 Geo. 1, c. 18, s. 4.

On the next day, 3d November, at the opening of the poll at the place of election, the lord mayor, in the presence and hearing of all the candidates and their friends, stated, that as the ward was small and more than one poll clerk was unnecessary, it would be a convenience both to him and the electors to have but one, and he then directed *Ralph Richardson* to be the sole poll clerk, for taking the poll during the remainder of the election. This was not objected to by either of the candidates, or by any other person whatsoever. From this time *Ralph Richardson* acted throughout the subsequent proceedings of the election as the sole poll clerk. In the course of the second day of the poll, *Richardson* transcribed from the poll books of *Peacock* and *Watts*, into his own poll book, the three votes taken on the 2d November. At the trial, the two original poll books of *Peacock* and *Watts* were produced, and it was admitted that the votes had been transcribed accurately from them, though not in the proper order, into *Richardson's* poll book, which was also produced in evidence. At the close of the poll on the 3d November, and again on the 4th No-

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vember, when the election terminated, the poll book of *Richardson* was signed and sealed up by the lord mayor.

The poll finally closed on the 4th November, and the wardmote was then duly adjourned to the 6th November, at the same place, by a proclamation directing the suitors to depart thence, and give their attendance on the 6th November, at half past ten o'clock in the forenoon, at the same place.

On that day *Richardson's* poll book was publicly opened at the place of election, and cast up, including the votes transcribed by *Richardson* from the other poll books when the numbers were stated to be,—

For *Henry Winchester*, Esq. . . . . 30

For *Edward Archer Wilde*, Esq. . . . . 27

For *Thomas Crook*, Esq. . . . . 3

and these numbers were accordingly there publicly declared to the electors on the 6th November, 1826, by the Right Honourable *William Venables*, the lord mayor and presiding officer at such election.

Immediately on this declaration being made, a scrutiny was duly demanded by the said *Edward Archer Wilde*, and granted; and the proceedings of the wardmote on the 6th November terminated by a proclamation "that the suitors might depart thence, and give their attendance on a fresh summons." This form of proclamation is also adopted in the city of London at courts of wardmote and of common hall, which are also held by precepts from the lord mayor, when the business for which such courts have been called is terminated. The form adopted when the business is not terminated, is to adjourn the court to some stated day; and in such cases no mention is made in the proclamation of the suitors being required to attend again on fresh summons, nor is any new precept issued.

On the 8th November, the Right Honourable *William Venables* went out of office as lord mayor of the city of London, and was on that day succeeded by the Right Honourable *Anthony Brown*.

On the 21st November the said Right Honorable *Anthony Brown*, then lord mayor of the city of London, issued the following precept:—

“ To the Common Councilmen of the Ward of Vintry, in the City of London.

“ By the Mayor.

“ Whereas on the 6th day of November instant a wardmote for the ward of Vintry was by several previous adjournments continued and held on that day for the election of an alderman of the said ward in the room of *Christopher Magnay*, Esq., deceased, and a scrutiny being that day demanded in favour of *Edward Archer Wilde*, Esq., one of the candidates, a scrutiny was also demanded in behalf of *Henry Winchester*, Esq., one other of the candidates, which were severally granted by *William Venables*, Esq., then lord mayor; and scrutineers were named by each of the said candidates, and the wardmote was adjourned, and the electors ordered to attend on a fresh summons: these are, therefore, to require you to cause a wardmote to be summoned and held before me at Cutlers’ Hall, in the ward of Vintry, on Friday the 24th of this instant November, at ten o’clock in the forenoon of the same day, for the purpose of proceeding on the said scrutiny. Hereof fail not.”

Under this precept the wardmote met on the 24th November. Both the lord mayor, *Brown*, who presided, and the late lord mayor, *Venables*, were present at the opening of it, and *Richardson*’s poll book was handed over by the late lord mayor to *Brown*, the then lord mayor and presiding officer, when the late lord mayor, *Venables*, left the court, and did not afterwards attend at or interfere in the said election.

Before the scrutiny was entered upon, the following protest, in writing, was tendered by *Wilde* to the lord mayor, as presiding officer:—

“ Vintry Ward. Being advised that the proceedings at this wardmote, in respect of the scrutiny of the votes taken on the election of an alderman, are illegal, and will not de-

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termine the said election, and your lordship having determined to proceed therewith, I hereby protest against being concluded from taking any objection hereafter to these proceedings, by now objecting to the votes given in favour of Mr. Sheriff *Winchester*, and supporting the votes given in my favour, or taking any other part in the business of this wardmote."

At the close of the scrutiny, the lord mayor, *Brown*, declared Mr. *Winchester* to have been duly elected, and the following return was made to the Court of Aldermen:—

"At a wardmote holden on Thursday the 2d day of November, 1826, at Cutlers' Hall, in the ward of Vintry, before the Right Honorable *William Venables*, the then lord mayor of the city of London, for the election of alderman of the said ward, in the room of *Christopher Magnay*, Esq. deceased,

"The only candidates proposed were *Henry Winchester*, Esq., citizen and cutler; *Edward Archer Wilde*, Esq., citizen and dyer; and *Thomas Crook*, Esq., citizen and cordwainer; and which same candidates were severally put in nomination for the said office, when it appeared upon the shew of hands that the said *Henry Winchester* had the majority, and thereupon the said *Edward Archer Wilde* and *Thomas Crook* demanded a poll, and upon the said demand being made, the said *Henry Winchester* also demanded a poll, which was granted by his lordship, and ordered to commence; and at a quarter before five of the clock in the afternoon the poll was closed for that day, in the presence of the said candidates, and by proclamation his lordship adjourned the said wardmote till Friday, the 3d day of November then instant, and now last past, at ten o'clock in the forenoon; and pursuant to such adjournment his lordship went to the said wardmote and opened the same, and continued the said poll from the said hour of ten of the clock in the forenoon until four of the clock in the afternoon of the same 3d day of November, and then closed the same for that day, in the presence of the said candidates. And by a

further proclamation adjourned the said wardmote until Saturday, the 4th day of November then instant, and now last past, at ten of the clock in the forenoon; and pursuant to such last mentioned adjournment, his lordship went to the said wardmote, and opened the same, and continued the poll from the said hour of ten of the clock in the forenoon, until four of the clock in the afternoon of the same 4th day of November, and then finally closed the same in the presence of the said candidates. And by further proclamation adjourned the said wardmote until Monday the 6th day of November then instant, and now last past, at half past ten of the clock in the forenoon; and pursuant to such last-mentioned adjournment, his lordship again opened the wardmote at half-past ten of the clock in the forenoon of the same 6th day of November, and declared the numbers to be,—

For *Henry Winchester*, Esq. . . . . 30

For *Edward Archer Wilde*, Esq. . . . . 27

For *Thomas Crook*, Esq. . . . . 3

and thereupon declared the choice had fallen on the said *Henry Winchester*, Esq., and declared him duly elected alderman of the said ward. The said poll books were, by the consent of the candidates, sealed up by his lordship, and kept in his possession during the said several adjournments; and upon the aforesaid declaration being made, the said *Edward Archer Wilde* demanded a scrutiny, and upon the said demand being made, the said *Henry Winchester* also demanded a scrutiny, which were severally granted by his lordship, and the said wardmote was adjourned, and the electors ordered to attend on a fresh summons; and on Friday the 10th day of November now last past, a copy of the poll was delivered to each of them, the said *Henry Winchester* and *Edward Archer Wilde*, pursuant to the statute." The return then stated all the proceedings on the scrutiny, upon which nothing turned, and concluded by stating, that "the lord mayor, as and in the place of election, openly and publicly declared that the said *Henry Winchester*, Esq. was

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duly elected alderman of the said ward, in the room of the said *Christopher Magnay*, Esq., deceased; and the number of legal votes appearing to him upon such scrutiny for each candidate, was as follows, that is to say,—

For *Henry Winchester*, Esq. . . . . 26

For *Edward Archer Wilde*, Esq. . . . . 23

For *Thomas Crook*, Esq. . . . . 3

And the said wardmote was then by order of his lordship dissolved. All which I humbly certify to this honourable Court, this 19th day of December, 1826.

(Signed)

*G. T. R. Reynal*,

Attorney in waiting."

Upon the above return being made to the court of aldermen, the proceedings set forth in the return to the mandamus were had.

The acts of common council of the city of London, of 6th December, 1712, 15th April, 1714, and 17th April, 1812, were proved (a).

The questions for the consideration of the Court are, first, whether the decision of the court of aldermen, as set forth in the return to the mandamus, was conclusive; and if not, then, secondly, whether, upon the facts stated, Mr. *Winchester* was duly elected.

*E. H. Alderson* for the crown. First, Mr. *Winchester* was duly elected according to the provisions of the statute 11 Geo. 1, c. 18; and secondly, there is nothing in the return to prevent his admission: therefore, a peremptory mandamus ought to go.

First, assuming for the purposes of the present argument that Mr. *Winchester* had the majority of legal votes, he was

(a) The act of 6th December, 1712, provides that the wardmote court shall be adjourned from time to time, and kept on foot for that purpose until it shall be there openly declared, after a scrutiny, if demanded, which of the candi-

dates was duly elected; and that of 17th April, 1812, provides, that the lord mayor shall, within eight days after a vacancy in the office of alderman, summon a wardmote to elect another.

duly elected. The statute applies generally to all elections within the city of London, as well those of members of parliament, as those of city officers. It provides, by the first section, that at all elections of aldermen, &c., the presiding officer shall, in case a poll be demanded, appoint a convenient number of clerks to take the same, which clerks shall take the said poll. But it does not provide that the same number of clerks originally appointed shall be continued throughout the election; and it would be both a narrow and inconvenient construction of the act to give it such an effect. The first objection, then, which will be taken, arising out of the circumstance of two of the clerks having been discontinued after the first day's poll, is answered. The same objection was once raised against the same mode of proceeding by a sheriff at an election of members of parliament, but was voted to be frivolous and vexatious. *London case (a)*. It will, however, no doubt be contended that the poll book kept by *Richardson*, who was continued as poll clerk during the whole election, could not contain the names of all the voters. But in point of fact it did contain them all. The three votes polled on the first day were not originally entered in it; but they were afterwards copied into it from the books of the other poll clerks, and that copy was authenticated by the presiding officer; and all the three books were produced at the trial. The second objection that will be taken is, that the presiding officer was changed in the course of the election. In this there is no weight. The presiding officer is the lord mayor for the time being, and he presides, not in his individual, but in his corporate character. All the proceedings at this election were had before the lord mayor for the time being, and therefore they were valid. There have been instances of elections of members of parliament, where the sheriff has died, or there has been a change of sheriff, during the election, and in which an objection similar to this has been

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(a) 2 Peckw. 268.

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held unavailing. *Dorchester* case (a). It would, indeed, be extremely inconvenient in the city of London if this were not so; because, as a precept for the election of an alderman must issue within eight days after the office becomes vacant (b), which must always be a day uncertain, and as the lord mayor goes out of office on a day certain, nothing could be more likely to occur than that a lord mayor should be obliged to commence an election without the possibility of completing it. The third objection will be to the mode of adjourning the wardmote, it having been adjourned to meet again on a fresh summons, instead of being adjourned to a day certain. But there is nothing irregular in this mode of adjournment. An adjournment to a day certain was in this case impracticable, because it could not then be known when the candidates would be prepared to proceed in the scrutiny. They are allowed an interval for delivering in their lists of disputed votes, and the time for proceeding in the scrutiny is to be calculated from the time of these lists being delivered; so that the presiding officer, not knowing when the lists would be delivered in, could not fix the day for re-assembling the wardmote. It has been held, with respect to jury process, a case very similar in principle, that a venire facias made returnable at a day certain is bad. *Rex v. Nurse* (c). It will, however, be contended that this was in effect a dissolution, and not an adjournment of the wardmote; but assuming that argument to be correct, the circumstance is wholly immaterial, because it is not necessary that a scrutiny should be held at a wardmote at all (d). But supposing all these

(a) 10 Parl. Journ. 300; Heywood, 14.

(b) *Ante*, 48, (a).

(c) 1 Sid. 348, where a judgment at the assizes was reversed on this ground, (amongst others) that the venire facias ought to have been made returnable ad proximas assisas generally, and not on the particular day on which the assizes

were in fact held. It is of course otherwise in civil causes pending in the courts at Westminster, in which the venire facias is returnable in bank on a general or particular return day.

(d) See s. 4 of the statute 11 Geo. 1, c. 18, which regulates the scrutiny, but makes no mention of the place where it is to be held.

objections to be well founded, they involve at most mere irregularities, which are not sufficient to make the election void, because this act of parliament, like many others, is in these particulars directory only. *Rex v. Pole* (a), *Rex v. Sparrow* (b), *Leicestershire* case (c), and *Dublin* case there cited. As these are matters over which the candidate can exercise no control, it would be unjust indeed that he should be prejudiced by them. "Acts of Parliament are to be so construed as that no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged" (d). This is the ancient rule of construction laid down by Lord Coke, and adopted by Abbott, C. J., in the *Margate Pier Company v. Hannam* (e), and is, if applied to the present case, a complete answer to all these objections (f).

Secondly, there is nothing in the return to the mandamus to prevent the admission of Mr. Winchester. The Court of lord mayor and aldermen have indeed decided that he was not duly elected; but the question is, whether their decision is conclusive. They set out in their return a custom, which it is admitted must be considered as if found in an act of parliament, and by which they claim "to have the cognizance, jurisdiction, and authority of examining, hearing, determining and adjudging of and concerning the election and return of every person elected into any place or office within the said city, at any such wardmote court holden as aforesaid." But they do not claim an exclusive jurisdiction; there are no words in the return negating or excluding the jurisdiction of this Court: in the case of *Browne v. Renouard* (g), which was a claim of cognizance by the University of Cambridge, there were such words set out. It is a general rule that the jurisdiction of this Court cannot be excluded but by express words.

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(a) Selw. N. P. 7th ed. 1071, n.

(b) 2 Stra. 1123.

(c) 1620. 1 Peckw. 45.

(d) Co. Litt. 360 a.

(e) 3 B. & A. 266.

(f) And see 2 Inst. 23, 25; 3 Inst. 136.

(g) 12 East, 12.



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*Foster's case (a)*, *Rex v. Moreley (b)*, and *Rex v. Shepherd (c)*. Almost every corporation possesses a power of amotion over its own members, and yet this Court has jurisdiction to inquire whether that power has been duly exercised, and where it has not, to issue a mandamus to restore. *Rex v. Mayor of Leeds (d)*, *Rex v. Axbridge (e)*, *Rex v. Mayor of London (f)*. If this is a good return, and the court of lord mayor and aldermen possesses the exclusive right of deciding upon the validity of this election, their decision in favour of an election would be an answer to a quo warranto information, even though it appeared that all the provisions of the statute relative to the election had been violated. It follows that the right claimed by this return is inconsistent with the statute, and was extinguished by it, even if it existed before.

But, lastly, the return is bad, and therefore a peremptory mandamus must issue. The return is inconsistent with itself. It first shews that Mr. *Winchester* was elected, then states that he was rejected by the lord mayor and aldermen, and lastly avers that he was not elected. The case of *Regina v. Mayor of Norwich (g)* is an express authority to shew that such a return is bad. There the question was respecting the election of one of the aldermen of Norwich, who must, by the terms of their charter, be elected in the same manner as the aldermen of London. A mandamus having issued to admit one *Dunch* an alderman; the corporation returned that he had been elected by the ward, but rejected by the mayor and aldermen, setting out the grounds of such rejection, and concluded by stating, "quod non fuit electus. (h)" That return was held bad, and a peremptory mandamus was granted.

(a) 5 Co. Rep. 59.

(b) 2 Burr. 1041.

(c) 3 B. & A. 414. And see other authorities upon this point collected in 4 Bla. Com. 18th ed. 266, n. (11), 320, n. (7).

(d) Stra. 640.

(e) 2 Cowp. 523.

(f) 2 T. R. 177.

(g) 2 Lord Raym. 1244.

(h) *Rex v. P. Williams, ante*, vol. iii. 405.

*Parke*, contrà. The return may be multifarious, but it is not therefore bad, because it is not inconsistent or contradictory. It first sets out certain acts done towards an election; it then states that the court of lord mayor and aldermen decided that those acts did not constitute a valid election of Mr. *Winchester*; and it concludes by alleging that he was not duly elected. These are independent but not inconsistent statements; and in *Rex v. The Mayor of Cambridge (a)*, where the return consisted of several independent matters, not inconsistent with each other, but part of them good in law and part bad, this Court held that they might quash the return as to such part only as was bad, and put the prosecutor to plead to or traverse the rest. The present is a very different case from that of *Regina v. The Mayor of Norwich (b)*. There the return stated, first, that *Dunch* was elected, and afterwards that he was not; statements which it was impossible to reconcile: and therefore the return was quashed. Here the return is good in form, and as the concluding part of it only is traversed, the rest must be taken as admitted. If so, the custom must be taken to exist as alleged, namely, that the court of lord mayor and aldermen "have the cognizance, jurisdiction and authority of examining, hearing, determining and adjudging of and concerning the election and return of every person elected into any place or office within the said city, at any such wardmote court holden as aforesaid." The argument then is, not, as is assumed on the other side, that the jurisdiction of this Court can be excluded, but that this Court has no jurisdiction. In the instances of inferior Courts, where various causes, civil and criminal, may be tried, this Court undoubtedly has a common law jurisdiction, which cannot be taken away but by the express provisions of a statute; but their jurisdiction over corporations stands on a very different footing. They may compel corporations to do their duty, but they cannot dictate to them the mode of doing it. Thus, where a party

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(a) 2 T. R. 456.

(b) 2 Lord Raym. 1244.

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has an inchoate right to be admitted a member of a corporation, this Court will enforce his admission by mandamus; because the corporation have no judicial authority to adjudicate upon his right (a): but where a corporation has an option, where they are empowered to admit members or not, at their discretion, the admission of a party cannot be enforced by *mandamus*. *Rex v. Eye* (b). The cases of amotion turn upon the same principle. At common law a member of a corporate body cannot be amoved, until he has been convicted of an offence, *Bagg's case* (c); all further power of amotion must be vested in the corporation by their charter. If the charter give a power of amotion for reasonable cause, this Court will inquire into the cause; but if it give a power of amotion for such cause as the corporation think reasonable, this Court will not interfere (d). So in this case the court of lord mayor and aldermen had jurisdiction to decide upon the election, and if they had decided that Mr. *Winchester* was duly elected, that would have been an answer to a quo warranto information filed against him, or to a mandamus to them to amove him. By virtue of the custom they stand in the situation and fill the character of a visitor, into the validity or invalidity of whose decision this Court cannot inquire, *Philips v. Bury* (e), where Lord *Holt*, C. J., said, that a visitor, in a return to a

(a) "An inchoate right to become a member of a corporation may be acquired by several well-known means, as by birth, servitude, or marriage; and where such a right has been so acquired, this Court will interfere to see it perfected." Per *Abbott*, C. J., in *Rex v. West Looe*, 5 D. & R. 598; *S.C.* 3 B. & C. 677.

(b) 4 B. & A. 271; 2 D. & R. 172; 1 B. & C. 85.

(c) 11 Co. Rep. 94.

(d) Where a charter of a corporation declared that "it should be lawful for the mayor and capital

burgesses to amove any of their body for non-residence within the borough;" it was held, that this gave them a discretionary and not a compulsory power of amotion: and the Court refused a mandamus to them to assemble and consider of the propriety of amoving certain non-resident members. *Rex v. West Looe*, 5 D. & R. 414. And see *Rex v. Portsmouth*, 4 D. & R. 767; 3 B. & C. 152; *Rex v. Totness*, 5 D. & R. 481; and the authorities there collected.

(e) 2 T. R. 351. And see *Rex v. Bishop of Ely*, 2 T. R. 290, 345.

mandamus, need only say that he had decided. The jurisdiction of a visitor might well be given by charter to one branch of this corporation; the custom, the existence of which is admitted, must be presumed to have originated in a charter: and all lawful customs of the city of London were confirmed by statute 2 & 3 W. & M. sess. 1, c. 8. The right now claimed was recognised in this Court in the case of *Regina v. Heathcote (a)*, where it is said, "It is argued that the court of aldermen have quashed returns in particular for want of qualification. They are to chuse one out of the four, and have the final determination." The same is also mentioned in *Stowe's Survey of London*, p. 58. If then such a jurisdiction, founded in custom, be lawful, the only question is, whether it has been taken away by the statute 11 Geo. 1, c. 18. Now that statute regulates only a small part of the proceedings at city elections. It commences with providing for the appointment of poll clerks, and regulates the proceedings from thence down to the declaration of the election after the scrutiny; but it makes no mention of the return to the lord mayor and aldermen, or of any subsequent proceedings. Now the custom authorising the return and the subsequent proceedings having been confirmed by a former act of parliament, cannot be taken away by one of later date, except by express words therein contained, and the 11 Geo. 1, c. 18, contains no such words; and the necessity of making the return, though not mentioned in that statute, was recognised in the case of *Rex v. Harte (b)*, 15 Geo. 3. The facts of that case, as they appear from the record, were these:—During the mayoralty of *Bull* a vacancy occurred, and *Harte* and *Neate* were candidates. *Harte* had a majority upon the poll, and *Neate* demanded a scrutiny. The Court was adjourned, to meet again on a fresh summons. At the adjourned meeting *Harte* refused to attend, and

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(a) Fortescue, 294.

was in Court, by the defendant's

(b) Not reported. The facts

counsel.

as stated from the record, which

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votes were struck off so as to give a majority to *Neate*. *Harte* was admitted under a mandamus, and *Neate* filed a quo warranto information against him. *Harte* pleaded his election, but the plea made no mention of the scrutiny, or of the return to the lord mayor and aldermen. The replication stated the scrutiny, and the bye-law of 13 *Ann.* requiring a return of one person for alderman to that court. To this there was a demurrer; and judgment was given in favour of *Neate*, the relator. Therefore the Court must have been of opinion that such a return was still necessary, notwithstanding the statute 11 *Geo.* 1, c. 18.

The other points in the case are of comparatively small importance, and are less relied upon, but still it is necessary to notice them, because if the regular course of proceeding has been in any material degree departed from, Mr. *Winchester* has not been duly elected. The objections to the course of proceeding actually pursued are three:—The first is, that the wardmote court was improperly adjourned; that it was in fact dissolved during the election. The wardmote is an ancient court, and analogous to the hundred court, or court-leet; 7 *H.* 6, 36 (a); 4 *Inst.* 249; *Fort.* 288. The lord mayor's precept invested that court with a special authority to proceed to the election, and that being the case, it was necessary that the election, in order to be valid, should be begun and completed at the same court. The court, therefore, ought to have been adjourned to a day certain, which is expressly provided for by the bye-law of 1712. It is a general principle common to all courts, that if they are dissolved, instead of being adjourned, while proceedings are pending, those proceedings become unavailing; 4 *Inst.* 27; *Bro. Abr.* tit. *Commission et Commissioners*, pl. 12; 1 *Edw.* 6, c. 7, s. 6; *Rex v. Polstead* (b); and the same principle applies also to elections of members of parliament. *Southwark* case (c). It is important to consider the various successive steps that are to be taken in an election, namely, the nomination, the shew

(a) P. 7 *H.* 6, fo. 36, pl. 42.

(c) 17 *Parl. Journ.* 73.

(b) 2 *Stra.* 1263.

of hands, the poll, and the scrutiny. All these must be taken at the same court, for the precept directs that the election shall be made at the wardmote court, and the election is not complete until the result of the scrutiny, where a scrutiny is demanded, is ascertained. If the court be dissolved before the election is complete, the presiding officer at the next court, even if he be the same person, cannot take notice of the proceedings at the former court. It has been said that the court was only adjourned, and not dissolved; but there is no definition of the word *adjournment* which at all supports that argument. *Cowell* defines it to be "diei dictio, assignment of a day (a), or putting off to another day and place." *Spelman* defines it, "diem alium dicere." In *Termes de la Ley* it is said, "adjournment is when a court is dissolved and determined for the present, and assigned to be kept again at another place or time" (b). Moreover, the case itself is decisive of this point; because it finds that the form adopted was that which is used when the business, for which the court has been called, is terminated; in other words, when the court is dissolved. The second objection is, that the presiding officer was changed during the election. All acts at the common law must be commenced and perfected by the same officer, although he may have ceased to be in office; *Clerk v. Withers* (b); a rule which it seems very reasonable to extend to a case

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(a) The original French word "adjournement," signifies the appointment of a future day generally, without reference to postponement; and being commonly used to denote a judicial order for the appearance of a party in Court, it may be considered as equivalent to a summons. *Et Vide Terrière, Dict. de Droit, in verbo.*

(b) In *Jacob's Law Dictionary*, (2d ed. by *Tomlins*), *adjournment* is defined to be "a putting off until another time or place, as adjournment in eyre is an appointment of

a day when the justices in eyre will sit again." *Dr. Johnson* defines the verb to *adjourn* thus:—"to put off to another day, naming the time; a term used in juridical proceedings; as, of parliaments, and courts of justice." *Adjournment* he defines as "an assignment of a day, or a putting off till another day;" and he cites as an authority, "adjournment in eyre, an appointment of a day, when the justices in eyre mean to sit again. *Cowell*."

(b) 1 Salk. 322; 2 Lord Raym. 1072.

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like the present. The new lord mayor can have no judicial notice of the proceedings had prior to his coming into office. How then can he make a true return of them? Yet he is bound to do so, at the peril of an action. To place him in a situation of such difficulty would be extremely unjust. The last objection is, that no poll book such as the statute requires was kept of the first day's poll. *Richardson*, who kept the only poll book after the first day, took no votes on that day; his book merely contained copies of votes taken by others on that day, and he was not sworn to take true copies from others, but to *take the poll* himself truly. As regards the first day's poll, therefore, he was not sworn at all, and was not in any respect such a poll clerk as the act requires.

*Alderson*, in reply. The argument pressed on the other side upon the main point, namely, the jurisdiction of the court of lord mayor and aldermen, proceeds entirely upon the assumption that they must be regarded as *quasi* visitors, for which *Phillips v. Berry* (a) has been cited as an authority. But the distinction there taken by Lord *Holt* between corporations for public and those for private purposes, applies to the present case, and shews that the jurisdiction here is not of a visitatorial nature. He says, "Those (corporations) that are for the public government of the town, city, mystery, or the like, being for public advantage, are to be governed according to the law of the land. But private and particular corporations for charity, founded and endowed by private persons, are subject to the private government of those who erect them." As to the supposition that the wardmote court was dissolved, the case cited of *Rex v. Harte* is an authority the other way, for there the adjournment was to re-assemble on a fresh summons, which was not considered as a dissolution.

The case was argued in the course of last Trinity term, when the Court took time for consideration. Judgment was now delivered by

(a) 2 T. R. 351.

Lord TENTERDEN, C. J.—It was contended upon the argument of this case, which comprised both the return and the facts found at the trial, that the return was inconsistent, and if we were of that opinion the return ought to be quashed. But we are not of that opinion, for we see no inconsistency in alleging that a person has not been duly elected, and that a tribunal authorised to decide upon his election has declared his election void. Those are distinct allegations, but they are perfectly consistent with each other. We come then to consider the questions specifically stated at the conclusion of the case.

First, is the decision of the court of lord mayor and aldermen conclusive? because if that court has jurisdiction to decide finally, and the jurisdiction of this court is excluded, the other question does not arise.

The return alleges that a court of lord mayor and aldermen has been from time immemorial a court of record, and has from time immemorial had the cognizance, jurisdiction and authority of examining, hearing, determining and adjudging of and concerning the election and return of every person elected into any office within the city at any court of wardmote, (and the election in question was at a court of wardmote,) whenever the merits of any such election or return have been brought into question by the petition of any person interested therein; and that this election was so brought into question, and adjudged to be void. The return does not allege that the court of lord mayor and aldermen has the *sole and exclusive* cognizance, but only that it has the *cognizance*. Now in a claim of cognizance of a suit it is *always* alleged, in some words or other, that the court claiming the cognizance has the sole and exclusive jurisdiction, and that the authority of other courts is excluded; and when there is no allegation to that effect, the claim is always disallowed. The claim in *Browne v. Besouard* (a), the Cambridge case, contained an allegation to that effect. The claim made by this return is not, indeed, strictly speaking, a claim of cognizance of a suit, but it is

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(a) 12 East, 12.



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perfectly analogous to it, and must be governed and determined by the same principle of law. That principle is, that the jurisdiction of the king's superior Courts, over matters originally cognizable by them, cannot be taken away but by express words, or, perhaps, by a necessary implication arising from the use of words absolutely inconsistent with the exercise of a jurisdiction by the superior Courts, and to which effect cannot be given but by the exclusion of such a jurisdiction. Let us, therefore, see, whether the authority claimed by this return, assuming it not only to have existed, as alleged, from time immemorial, but considering also that, being in the case of the city of London, this ancient usage must be regarded as having received the confirmation of the legislature, is inconsistent with the jurisdiction of the Court of King's Bench, or whether both may not exist together, the authority of the city court being subordinate to and subject to the revision and control of this Court.

Corporations in general have power to amove the members of the select body for sufficient cause. Might it not be alleged, in the very words of this return, that this corporation has the cognizance, jurisdiction and authority of examining, hearing, determining and adjudging of and concerning the amotion of a member, upon complaint made of misbehaviour by some other member or person interested in the welfare of the corporation and the conduct of the members of the select body? Yet, certainly, no lawyer would contend that such a return would be a sufficient answer to a mandamus to restore. But higher examples may be adduced. The Court of Common Pleas has the cognizance, jurisdiction and authority of examining, hearing, determining and adjudging of and concerning pleas of land; and, in the first instance, that Court *alone* has generally that cognizance, &c. So this Court has the like cognizance, &c., as to pleas of the crown. Yet the decisions of both these Courts are subject to the revision of a superior Court on a writ of error; so that the mere allegation of cognizance, &c.,

by no means imports sole and exclusive jurisdiction and authority to determine and adjudge without revision or control.

Then, if the allegation in this return is not so worded as necessarily to exclude the jurisdiction of this Court, is there any thing in the substance or subject-matter of the allegation that warrants such an effect being given to it? If this return of the jurisdiction of the city court be a sufficient answer to a mandamus to admit, it must also be a good plea in bar to an information in the nature of a quo warranto, and even to a quo warranto by the Attorney General. The consequence would be, that the court of lord mayor and aldermen would possess an absolute control over all elections at wardmotes to city offices, and might declare every election void, one after another, until an individual agreeable to themselves were chosen. Let it not be imagined that I insinuate the *probability* of any such thing occurring in modern times; I merely mention the *possibility* as an argument against giving to this allegation the effect to which I have alluded. The common law feels a wholesome jealousy of the decisions of all its tribunals, and manifests that jealousy by its abundant provision for successive writs of error, until the case arrives at the highest Court and supreme authority, which must of necessity exist somewhere in every country.

It may be asked, of what use is the jurisdiction of the court of lord mayor and aldermen, if their decision be not final? I will not answer that question by asking, of what use is the jurisdiction of any Court, whose decisions are not final? I answer affirmatively, it is of great use. Their decisions often have been, and I trust often will be, acquiesced in, from a conviction of their justice, and thereby great delay, expense and agitation avoided; and we should deeply lament our decision upon this point, (upon which, however, we are compelled to give a decision,) if it should have the effect of preventing the exercise of what we consider a highly useful and salutary power.

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It was argued in support of the return that this power of the court of lord mayor and aldermen was in the nature of a visitatorial power, but no case was cited as shewing that one branch of a corporation can have a visitatorial power over another. The visitatorial power emanates from the founder. In royal foundations of a private or eleemosynary character, if no special visitor has been appointed, the king exercises the power by his chancellor. In corporations established for the government of cities and towns, the king may be said to exercise the power by this Court, his Court before himself, according to the law and constitution of the realm. All ancient customs and prescriptions must be considered with reference to the rules of common law; and where they are found to be repugnant to those rules, and contrary to law in any respect, they have been always adjudged void. Even an act of parliament confirming, in general terms, the ancient usages and customs of a city, must, I apprehend, be construed as confirming those only which betray no such repugnance or contrariety. Many matters may be good and valid by custom and prescription, which would otherwise be invalid, and to such only can a general confirmatory statute be taken to apply.

The rule which I have mentioned, as to the jurisdiction of the king's superior Courts, has been acted upon in many cases. Some of them were cited in argument. It is unnecessary to refer to them, because the rule is well known and generally recognized. The case of *Regina v. Heathcote* (a) is certainly no authority in support of this return. It does not appear distinctly, from the report of that case, what was the object of the writ; but it does appear that the writ was either issued or applied for against the lord mayor alone, and at the period when the bye law requiring the wardmote to name four, of whom the lord mayor and aldermen were to chuse one, was in force: and I do not find any expression importing that this Court had not jurisdiction or authority in the matter, though there are several

(a) Fortescue, 294.

regarding the expediency and the effect of the writ then under consideration.

Our opinion then being that the custom stated in the return is not a sufficient answer to the writ, it becomes necessary to advert to the several objections made to the election under which Mr. *Winchester* claims to be admitted. We do not think it necessary to consider the operation of the statute 11 *Geo.* 1, c. 18, upon the bye laws of the corporation, (although, undoubtedly, where they are inconsistent with each other, the regulations ordained by the statute must prevail,) because, whether the objections be regarded with reference to the one or the other, we are of opinion that they are not sufficient to vitiate the election. They are all upon matters of form, and form only. It is not suggested that any inconvenience was occasioned, that the interest of any candidate was prejudiced, or that there was any intention to favour one in preference of another; all that was done seems, confessedly, to have been done openly, honestly and fairly. In determining whether an act is to become void, it is important to consider whether any inconvenience has occurred in the particular instance by a departure from form, or whether any may be expected to occur in future. The distinction between matters directory and obligatory is well known and established. An act may be improper in the actor, it may even subject him to a penalty; but it may, nevertheless, be valid for the sake of others who would be prejudiced by its being declared void. That point was so determined by this Court in the case of *The Margate Pier Company v. Hannam* (a).

I have thought it right to premise these observations, though they are, perhaps, inapplicable to the present case, and certainly do not affect the second objection made to this election. The first objection was, that the wardmote had not been adjourned from time to time, and kept on foot as required by the bye law of 1712. The statute is silent upon this point. The supposed dissolution of the ward-

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mote in fact took place after the poll had been closed, the numbers declared, and the scrutiny demanded and allowed. The form of the supposed dissolution was a proclamation that the suitors might depart and give their attendance on a fresh summons. It appears by the special case, that this form is also adopted in the city at courts of wardmote and common hall, where the business for which such courts have been called is terminated; and that the form adopted where the business is not terminated, is an adjournment of the court to some stated day, in which case no new summons or precept issues. The case does not state that an absolute and formal dissolution never takes place; and from the expression used at the close of the return made by the lord mayor and aldermen, namely, "that the wardmote was then by order of the lord mayor *dissolved*," it may rather be inferred that an absolute and formal dissolution does sometimes take place.

A proclamation, which was the form used on the occasion in question, would be in effect a dissolution of the wardmote, if no fresh summons issued; but we see no inconsistency or impropriety in issuing a fresh summons and proceeding with such business as remains unaccomplished. In this case no objection was made at the time to the form that was adopted; no person could be misled by it, for every person knew that a scrutiny, which was a new and distinct matter subsequent to the poll, had been demanded and granted; and no inconvenience could result. But an adjournment to a day certain might produce inconvenience, because the day on which the scrutiny would commence could not then be known; and if the day fixed should prove too early, there must be an useless meeting and another adjournment; if too late, the making of the return must be unnecessarily delayed. Besides, it might happen that the candidate demanding the scrutiny afterwards abandoned it; in which case, the wardmote might have been re-assembled, if necessary, and the return made without further delay. Considering, therefore, that the course actually adopted was

the most convenient, we are of opinion that this deviation from the letter of the bye law is not sufficient to invalidate the proceedings, and that the expression there used ought to be considered in the nature of a suggestion or direction only, and not as a peremptory ordinance essential to the validity of an election.

The next objection was the change of the presiding officer. There is nothing either in the act of parliament or in the bye laws requiring identity of person. In a majority of instances the person will be the same. If the change of person furnishes a valid objection in this case, it must be upon some ground of plain reason or of positive law. The change did not take place during the continuance either of the poll or of the scrutiny, but in the interval which necessarily occurred between them; and the poll and scrutiny are matters perfectly distinct from each other, though both may be necessary in order to ascertain the real majority, and to make the proper return where a scrutiny has been demanded. Did any inconvenience result from the change of person? None has been suggested, and none appears. None of the proceedings were interrupted. No judgment or discretion was to be exercised by the new lord mayor requiring any knowledge of the proceedings which had been had before his predecessor, beyond what the poll books were adequate to supply. But, it has been said, the lord mayor may be liable to an action for a false return. He may so. Each officer may be liable for his own acts; the first lord mayor for such as were done before he delivered up the poll book and transferred his authority to his successor; and his successor for such as were done afterwards. The change here having occurred during an interval between two distinct proceedings, none of the cases cited to shew that the officer who begins the performance of a public duty can alone proceed in it to its termination, are applicable to the present case. The course adopted produced no inconvenience; but if the change of person could invalidate the election, there would, in the

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present case, be the inconvenience of a double election; and in future, if an alderman should die towards the close of a mayoralty, as it could never be known beforehand whether a scrutiny would be demanded after a poll, it might be deemed necessary to postpone the election entirely until the new lord mayor had come into office, which would occasion inconvenient delay.

The last objection relates to the poll clerks and their books. The statute requires that upon a poll being demanded, the presiding officer shall appoint a convenient number of poll clerks, but it does not require that the number originally appointed shall be continued throughout the election, if it proves larger than convenience requires. It did so prove in this case, and therefore the lord mayor, after the first day, proposed to continue one poll clerk only, to which none of the parties objected. Three votes had been entered by the two poll clerks who were dismissed, two by one of them, and one by the other. These votes were correctly copied by the continuing poll clerk into his own book, and the other books were preserved, and all three were produced at the trial. In all this there was not only no inconvenience, but not even any deviation from any thing formally prescribed; and, as was said of an objection of this kind by another tribunal, we think this a frivolous objection.

This is our judgment upon the matters of law affecting this case. The proceeding must of course remain suspended until the arbitrator has decided upon the votes (a).

(a) The parties had previously agreed that the question as to the number of legal votes given for the respective candidates should be referred to a gentleman at the bar.

That question was afterwards decided by the arbitrator in favour of Mr. *Winchester*, who was thereupon admitted to the office.

## The KING v. The Inhabitants of RINGSTEAD.

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TWO Justices, by their order, removed *Henry Manning*, *Rebecca* his wife, and their four children, from the parish of Wellingborough, in the county of Northampton, to the parish of Ringstead in the same county. On appeal, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The birth settlement of the pauper *Henry Manning* was in the parish of Ringstead. His grandfather *Thomas Manning* being seised in fee of the premises hereinafter mentioned, by will dated 6th January, 1800, duly executed and attested, (after devising five acres of land in Ringstead to his eldest son and heir *John Manning* in fee in the words following, that is to say, I give and devise unto my son *John Manning* all those my five acres, more or less, of copyhold meadow ground, with their and every of their appurtenances, lying and being dispersed in the open and common fields and meadows of Ringstead aforesaid, now in my own occupation, and which I have duly surrendered to the use of this my will, to hold to him, his heirs and assigns, for ever, subject nevertheless, and I do hereby subject and charge the same estate to and with the payment of 25*l.* of lawful money of Great Britain, unto my daughter *Mary*, the wife of *Thomas Plant*, to be paid to her within twelve calendar months next after my decease,) gave and devised in the words following, that is to say, “I give and devise unto my daughter *Elizabeth*, the wife of my late son *Thomas Manning*, all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of *Henry Lawford*, situate in Ringstead aforesaid, and adjoining to the tenement in the occupation of *Joseph Manning*, to hold to her the said *Elizabeth Manning*, and her assigns, for and during the term of her natural life, if she shall so long continue a widow, and unmarried, and from and after her decease or day of marriage, which shall first

To gain a settlement by estate, the party must have an estate in possession.

Messuage *A.* was devised to *M.*, durante viduitate, and after her decease or remarriage, *A.* and also messuage *B.*, of which the testator made no other disposition, were devised to *N.*, who was not heir of the devisor, in fee:—Held, that *N.* took no estate in *A.* or *B.* till after the death or marriage of *M.*, during whose widowhood *B.* descended to the heir of the devisor; and that, therefore, *N.* gained no settlement by residing in the parish where the messuages were situate, while *M.* continued alive and unmarried.



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happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of *Joseph Manning*, and also all that my close or orchard, lying about the said homestead on the north side of a back lane, and now in the several tenures of myself, *Samuel Hackett*, and *Mary Whitney*, unto the four children of my late son the said *Thomas Manning*, deceased, namely, *Henry*, *John*, *Thomas*, and *Rebecca Manning*, to hold to them and to their several and respective heirs and assigns for ever, as tenants in common and not as joint tenants." The pauper is the *Henry Manning* mentioned in this last-mentioned devise, and is son of the said *Elizabeth Manning*. In 1806 the pauper acquired a settlement by hiring and service in the parish of Raunds. Having some years afterwards become chargeable to Ringstead, he was removed, with his wife, to Raunds, by an order dated 8th January, 1817, which order was never appealed against. Between 1817 and 1819, when the property was sold to one *Moss*, he resided above forty days in the parish of Ringstead, his mother having up to that time continued, and then being, a widow, and unmarried.

*Dwarris* and *Amos*, in support of the order of sessions. The fact of the pauper's sufficient residence in Ringstead being found by the case, the only question is, whether he had a sufficient estate to confer a settlement. It has certainly been decided that a party must have a present interest in an estate, in order to acquire a settlement, by residence upon it (*a*), *Rex v. Eatington* (*b*); but up to the

(*a*) It is not only necessary that the interest should be certain; but it must likewise be vested in possession. An estate in remainder or reversion does not confer a settlement any more than one in contingency or expectation; for the party has nothing of his own to

why he is rendered irremovable. 2 Nolan, 88.

(*b*) 4 T. R. 177. There, *G. M.* being seised in fee of a cottage, by indentures of lease and release, in consideration of 36*l.* therein mentioned to be paid, granted and conveyed the cottage in fee to the pauper, his son-in-law. The release

time of that decision it had been held that a party having an estate in the parish where he resided was not sufficient to confer a settlement, unless he resided upon the estate (a). That doctrine was afterwards exploded in the case of *Rex v. Houghton-le-Spring* (b), where it was decided that the owner of an estate had a right to reside in the parish where his property was situated, whether he occupied it himself, or let it to a tenant (c). In this case, therefore, if the

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contained the following proviso:—  
“Provided, that it shall and may be lawful for the said *G. M.* to live, inhabit, dwell in, and occupy, the said cottage or tenement, with the appurtenances, as he heretofore hath done, and now does, for and during the term of his natural life.” The pauper and his wife resided with *G. M.* for three months, until they were removed. It was held that the word *occupy* used in the conveyance, shewed that it was the intention to reserve a life estate in the whole cottage to *G. M.*, and not merely a liberty to dwell in it during his life. The pauper, therefore, had only an estate in remainder, which had not come into possession at the time of the removal, and that, consequently, he had not that which was necessary to confer on him a settlement, namely, a present interest.

(a) *Query*.—Is not this proposition somewhat too large? It does not seem to be supported, to its full extent, by any of the cases to be found in the books. In *Rex v. Houghton-le-Spring*, 1 East, 254, *post*, (c), where the contrary doctrine was established, and which has ever since been maintained, much doubt was entertained by *Lawrence, J.* and *Le Blanc, J.*, whether a person could acquire

a settlement by a residence in a parish where his property lay, but of which he was not in the occupation. The cases of *Ryslip v. Harrow*, 2 Salk. 524; *Rex v. St. Nyotts*, Burr. S.C. 133; and *Rex v. Sowton*, Burr. S. C. 128, they thought left the matter doubtful as to the occupation; at length, however, they all agreed that the case of *Rex v. Hasfield*, Burr. S.C. 147, *post*, 70, n. was decisive in favour of a settlement being gained, notwithstanding the occupation was in a tenant. See *Lewin on Settlements*, 436, (1). Now the cases alluded to do not seem to warrant even the doubt said to have been entertained. In *Ryslip v. Harrow*, *Holt, C. J.* said, “Having land in a parish will not make a settlement, but living in a parish where one has land will gain a settlement without notice.” In *Rex v. St. Nyotts*, it was held that a pauper could not be removed to a place where he had an estate of his own, unless he had been resident there, irremovable, forty days; but that afterwards he might. And in *Rex v. Sowton* it was expressly said that the residence need not be on the estate.

(b) 1 East, 247.

(c) If the estate be vested, the premises need not be in the own-

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pauper took an estate in fee under the will expectant upon the death or marriage of his mother, he had as much right to reside in the parish as if he had a reversion after a term of 1000 years. But it is clear that the pauper in this case took under the will a present interest in the estate. It was evidently the object of the testator to provide for all his family, and the will must be construed distributively for the purpose of effectuating that object. Now the will makes a provision, first, for the eldest son and heir, secondly, for the widow of the second son, and lastly, for the grandchildren. The testator did not intend to die intestate with respect to any part of his property, but if the grandchildren did not take a present interest under his will, part of his intention must be defeated, for then he has made no provision for their maintenance, which he plainly intended to do. The proper construction of this will is, that the testator gave to his grandchildren, immediately, all the property he devised to them, excepting only that which he had previously ex-

er's actual occupation; 2 Nolan, 89. In *Rex v. Hasfield*, Burr. S. C. 147, where an infant of the age of six years and a half became seised of a freehold estate, and resided in the parish with his grandmother, it was held that he could not be removed. In *Rex v. Houghton-le-Spring*, the pauper was entitled to three copyhold and one freehold house, as heir at law to his cousin. He agreed to let the freehold house, which was in Sedgfield parish, to *W.*, at 3*l.* per annum, the pauper undertaking to sink a cellar, and make some repairs. *W.* accordingly entered and occupied the premises as a public house, and the pauper, after such possession by *W.*, went to Sedgfield for the sole purpose of sinking the

cellar, and making the repairs, during the whole of which time he resided as a lodger in *W.*'s house. He was held to gain a settlement, upon the principle that residence in the parish in which the party has a freehold estate, confers a settlement, whether he resides on the estate or not, or whether or not he is in the occupation thereof. For a man, though not in the occupation of his own estate, may have many reasons for wishing to live in the neighbourhood of it, and is entitled to the privilege of superintending it. And see *Rex v. Dorstone*, 1 East, 296; *Rex v. Horsley*, 8 East, 405; *Rex v. Brington*, 7 B. & C. 546; *ante*, vol. i. 431, S. C.; *ante*, vol. iii. 338, 357.

pressly devised to their mother; *Cook v. Gerrard*(a); *Simpson v. Hornsby*(b); *Doe v. Brazier*(c).

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*Campbell, Humfrey, and M'Donnell*, contrà. It is an established principle in the law of settlements, that in order to acquire a settlement by estate, the party must have a freehold in possession—an estate of which he may be dis-seised. [*Bayley, J.* We none of us entertain any doubt upon that point]. Then the only point is upon the construction of the will. Now so long as his mother continued alive and unmarried, the pauper took only a freehold in futuro by way of executory devise, and not any present estate, under the will. It is said the testator intended the devise to his grandchildren to be immediate, but that is by no means clear; that may, or may not, have been his intention; it is a matter of doubt upon the face of the will, and an heir at law cannot be disinherited upon doubts; there must be either express words or necessary implication to oust the heir at law (d). It is equally consistent with the language of the will, to say that the testator intended all the property to go to his grandchildren at once upon the death or marriage of their mother; that he depended upon her

(a) 1 Saund. 181.

(b) Prec. in Ch. 439, 452.

(c) 5 B. & A. 64. These three cases are fully detailed, and the points in which they are distinguishable from the principal case clearly defined by *Bayley, J.*, in the judgment, *post*, 76.

(d) It is said that an heir at law cannot be disinherited by the plainest intention apparent upon the face of a will, unless the estate be completely disposed of to somebody else. *Denn v. Gaskin*, Cowp. 661. And that he takes, although clearly intended to be excluded, if it do not appear with certainty to whom, or in what proportions, the estates are devised. *Shulldham v. Smith*, 6 Dow, 22. And see

the judgment of *Best, J.* in *Doe v. Turner*, 2 D. & R. 403. Notwithstanding the strong expressions and an air of mystery which are to be found in these and in other cases, the principle of law appears to be simply this, that so far as there is no effectual devise of lands and tenements, the common law will take its course. It seems to have been forgotten in those cases, as it was at first, (*Fearne, C. R.* by *Butler*, App. 573,) in *Doe d. Bailey v. Pugh*, (2 Meriv. 348, 9,) that the law of England contains no provision for disinheriting an heir, though it allows the ancestor, by alienation taking effect during his life or at his death, to render the heirship of little value.

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providing for them so long as she lived and remained a widow, and therefore did not mean them to take under the will until that provision should cease by her death or marriage. The cases cited on the other side are all distinguishable from the present. *Doe v. Brazier* (a), is the most like it; but there the devise to the nephews was in danger of failing altogether, unless it gave them an immediate estate; a circumstance which seems to have had much effect upon the Court in deciding that they took an immediate estate. The true rule with respect to the exclusion of the heir at law was laid down by *Wilson, J.*, in *Habergham v. Vincent* (b), "that, whether the estate was meant for the heir or not, the intention is not material, if it is not given to some other person; for there is no other way to exclude an heir than by giving it to somebody else: therefore, if from the circumstance of part being so given, an inference could be raised, that the testator meant the heir should have no more; yet, even against that intention, the heir would take" (c). So, in *Comyns's Digest* it is said (d), "there shall not be a strained construction of words to disinherit an heir; and, therefore, whatever is not expressly disposed of descends to the heir." So, in *Coryton v. Hillier* (e), Lord *Hardwicke*, in the course of his judgment said, "In construing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that the intention contrary to that imputed to the testator cannot be supposed." There are many other cases in which similar principles in support of a construction favourable to the heir, where there is no express devise of the property to another, have been recognised and acted upon. They cited, upon this point, *Stanfield v. Habergham* (f); *Hopkins v. Hopkins* (g); *Jones v. Mitchell* (h); *Tregonwell v. Syden-*

(a) 5 B. & A. 64.

(b) 2 Ves. jun. 225.

(c) *Et vide Snelgrove v. Snelgrove*, 4 Dessaus. Cha. Rep. 301, 303.

(d) Com. Dig. *Devise*, N. 22.

(e) 1 Ves. & Bea. 466.

(f) 10 Ves. 273, 280.

(g) 1 Atk. 581.

(h) 1 Sim. & Stu. 290.

ham (a); *City of London v. Garway* (b); *Right v. Sidebotham* (c); and *Denn v. Gaskin* (d).

The case was argued at the sittings after Trinity term 1828, when the Court took time for deliberation; judgment was now delivered by

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BAYLEY, J.—The question in this case was, whether the pauper acquired a settlement by estate in the parish of Ringstead. That question depended entirely upon the construction to be put upon the will of his grandfather. If that will gave him an immediate estate, the pauper is settled in Ringstead; if it did not, he is not settled there. The words of devise upon which the question turns are these:—"I give and devise unto my daughter *Elizabeth*, the widow of my late son *Thomas Manning*, *all that part of a messuage or tenement, with the appurtenances*, which is now in the occupation of *Henry Lawford*, situate in Ringstead, and adjoining the tenement in the occupation of *Joseph Manning*, to hold to her the said *Elizabeth Manning*, and her assigns, for and during the term of her natural life, if she shall so long continue a widow and unmarried, and from and after her decease or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of *Joseph Manning*; and also all that my close or orchard lying about the said homestead, on the north side of a back lane, and now in the several tenures of myself, *Samuel Hackett* and *Mary Whitney*, unto the four children of my late son the said *Thomas Manning*, deceased, namely *Henry*, *John*, *Thomas*, and *Rebecca Manning*, to hold to them and to their several and respective heirs and assigns for ever, as tenants in common, and not as joint tenants." The question is, whether by that devise the testator intended to give his grandchildren an immediate estate in

(a) 3 Dow, 194.

(c) Dougl. 759.

(b) 2 Vern. 571.

(d) Cowp. 657.

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the property not devised to their mother for life. On the one hand, it has been contended, that the children take no present estate in the property not devised to the mother, but a freehold in futuro, by way of executory devise (a); on the other, that though they take a remainder only in the property devised to the mother for life, they take a present estate in the property not devised to her, and that the words "from and after her decease or day of marriage," must be construed distributively, so as to confine them to the property devised to the mother for life, and to leave the residue unaffected by them. If the latter be the true construction, the pauper and the other children of *Thomas* and *Elizabeth Manning* take an immediate estate in the residue. Now, for the purpose of furthering the manifest intention of the testator, there is no doubt that general words which, taken in their ordinary grammatical sense, apply to all the property devised, may be taken distributively, and that, *reddendo singula singulis*, they may be applied to that part of the property only to which they appear by the context to be applicable, so as to suffer the residue of the property, to which in their grammatical sense they would apply, to pass immediately. But, in order to warrant such a construction, it must appear clearly and without doubt from the other parts of the will, that such was the intention of the testator. If, therefore, there be nothing to shew that such was the intention of the testator in this case, the words of the devise, being general, must be construed in their ordinary grammatical sense, in which case they will apply to the whole of the property, and prevent any part of it from passing immediately to the

(a) During the widowhood of the mother, the whole fee in the property not devised to her for life would vest in the heir of the devisor, since an heir cannot take by descent a particular estate of freehold. It has, however, been laid down, (Fearne, C. R. 8th ed. 40; Sanders Uses, 141; Gilb. Uses, by Sugden, 119. n.) upon

the supposed authority of a passage in Co. Litt. (23, a.) which must be mutilated in order to support the position, that a covenantor in a covenant to stand seised, or a grantor, &c. may take a particular estate of freehold by way of *resulting use by implication*. And see this position examined in Hayes's Principles, 63, 67, &c.

children; and that part of it which is not devised to the mother, will pass to the heir at law during her life. (a). It is a general rule, that the heir at law cannot be disinherited, except by express words or necessary implication; and a necessary implication means such a strong probability, that an intention to the contrary cannot be supposed (b). Thus, if the devise be to the devisor's heir after the death of *A.*, an estate for life arises to *A.* by implication; but if the devise be to *B.*, a stranger, after the death of *A.*, no estate arises to *A.* by implication, but the devisor's heir takes during the life of *A.* In the first case, the inference that the devisor intended to give a life estate to *A.* is irresistible, because he could not, without the grossest absurdity, be supposed to mean to give his land to his heir at the death of *A.*, and yet that his heir should have it in the mean time; but where the devise is not to the heir, but to *B.*, a stranger, however probable it may be that by fixing the death of *A.* as the period when the devise to *B.* is to take effect in possession, the devisor intended that *A.* should take it for life, still it is possible to suppose, that, intending the land to go to his heir during the life of *A.*, he left it for that period undisposed of; and, therefore, in that case it goes to the heir. In this case there is no ex-

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(a) i. e. a fee will descend to the heir defeasible upon the taking effect of the executory devise. Even where the period as well as the event is certain, as where the devise is "to my heir from the end of a year from my death," the result will be the same. *Vide* Fearn, C. R. Introduction, note (a).

(b) An implication to raise an estate must be a necessary and inevitable implication; *Cas. temp. Talb.* 3; or, at least, highly probable; 2 Bla. Com. 381; so clear as to satisfy the conscience of the Court, and the reasonable doubts of every one; *Wright v. Holford*, *Cowp.* 31; not merely possible;

2 Bla. Comm. 381; or resting upon conjecture; *Cave v. Holford*, 3 Ves. 676. It is not, however, required that the inference shall have the force of a mathematical demonstration, and be absolutely irresistible; it is sufficient if the whole circumstances, taken together, leave no doubt in the mind of the judge who has to decide; provided the question be not of a nature to exclude all implication. *Hartley v. Hurle*, 5 Ves. 546; *Bootle v. Blundell*, 19 Ves. 517; *Wilkinson v. Adam*, 1 Ves. & Bea. 466; *Gittins v. Steele*, 1 Swanst. 28; 2 Bla. Com. 382, n. (14,) 18th ed.



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press devise of the property in question during the life of the mother; the children are not the heirs at law of the testator, but strangers: therefore, upon the principle that the heir at law cannot be disinherited except by express words or necessary implication, the devise to the children after the death of the mother gives them an interest which is to take effect only at her death, and the heir at law is entitled to the property during her life. The cases relied upon as shewing that the words of this devise ought to be construed distributively, were *Cook v. Gerrard*(a), *Simpson v. Hornsby*(b), and *Doe v. Brazier*(c). In the first of those cases, Sir Robert Kempe, Knight, was seised of the lands in question in fee, and was also seised of the reversion of other lands expectant upon the death of *Ruth Kempe*, his daughter-in-law, (whereof *Ruth* had an estate for life for her jointure,) and being so seised, the said Sir Robert Kempe by his will devised, that Dame *Elizabeth*, his wife, should have the free use of the demesne lands (being the lands in question) for one year after his death; and then, after stating that he was desirous to continue the capital messuage, with the appurtenances thereto belonging, in the blood of the *Kempes*, in which it had continued for ages past, he devised the demesnes and the reversion to the lessor of the plaintiff, habendum immediately from and after the expiration of one whole year next after his decease, and the decease of the said *Ruth Kempe*, (who was tenant for life of the lands whereof the testator had the reversion,) for the term of the life of the said *Thomas Kempe*, the lessor of the plaintiff, doing no strip or waste. The testator further directed, that *Thomas Kempe*, in consideration of the devise, should, immediately after the death of *Ruth Kempe*, pay to three persons, in the will mentioned, annuities of 20*l.* each, in half-yearly payments. The testator died, and the year expired. It was contended that it was necessary, in order to effect the intention of the testator, that the words should be taken distributively, so

(a) 1 Saund. 183.

(c) 5 B. & A. 64.

(b) Prec. in Chan. 439, 452.

that the devisee should have the reversionary lands after the death of *Ruth*, and the demesne lands after the death of the testator; and on three grounds:—first, because if they descended to *Mary Kempe*, his daughter and heir, she would probably change her name by marriage, and then the testator's intention, that the demesne lands should remain in the name of the *Kempes*, would be defeated; secondly, that if *Ruth* died within the year after the testator, the annuities given by the will could not be paid, unless the devisee took the land immediately upon the death of *Ruth*, notwithstanding the year was not expired; and, thirdly, that if the demesne lands should descend to the heir in the mean time until the death of *Ruth*, then he might commit what waste he pleased, and there would be no means to prevent him, which would be directly against the true meaning of the testator. On the other hand it was insisted, that the demesne lands should descend to the heir at law until the death of *Ruth*, and that the words of the will should be taken as they were, jointly and not distributively; and the rule that the heir at law is not to be disinherited but by express words or necessary implication was relied on. The Court of King's Bench held, that the words of the will should be taken distributively, and that the lessor of the plaintiff had good title to the demesne lands after the expiration of the year, and before the death of *Ruth*; and judgment was given for the plaintiff. In the course of the argument, this case was cited from *Moore's Reports*, (a). "A man seised of a manor, parcel in demesne and parcel in service, by his will devised to his wife all his demesne lands for her life; and also by the same will devised to her all the services and chief-rents for fifteen years; and further devised all the manor to another after the death of the wife; and it was adjudged that the devisee should take nothing until after the death of the wife, although the fifteen years had expired, and that the heir, at the expiration of the fifteen years, should have the services and chief-rents during the wife's life." In argument in the Exche-

(a) Trin. 3 Edw. 6, F. Moore, 7.

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quer Chamber, this case was relied upon in support of the writ of error. "To which *Saunders* gave this answer, namely, that there the second devisee was to take nothing by the words of the will until after the death of the wife; and the words being express, no construction could be made against them, which, he said, was the reason of the case; but he said that if the will had been, that the second devisee should have all the manor after the expiration of the fifteen years, and after the death of the wife, in that case it should be construed distributively, as in this case, namely, that the second devisee should have the demesne lands of the manor after the death of the wife, and the rents and services after the expiration of the 15 years." And that was a good answer, for if the devise in that case had been as *Saunders* hypothetically puts it, it would have clearly manifested the intention of the testator to give to the second devisee the reversion of all the lands he had previously given to his wife for life and for years, and then, in furtherance of that intention, the words must have been construed distributively; but as no part of the will manifested any such intention, the words were taken in their ordinary grammatical sense, and at the end of the 15 years, the heir-at-law took the chief rents and services for the life of the wife. The judgment of this Court in *Cook v. Gerrard* was afterwards affirmed in the Exchequer Chamber. But in that case also, there were circumstances shewing that the testator must have intended the heir-at-law not to take the demesne lands during the lifetime of *Ruth*; first, because he expressed his wish that they should continue in the name of *Kempe*; secondly, because he directed annuities to be paid half-yearly immediately after the death of *Ruth*; and thirdly, because he directed that no waste should be committed; so that the only effect of that case is to shew that in furtherance of the manifest intention of the testator, words, which taken in their ordinary grammatical sense are joint and apply to two classes of property, may be construed distributively; not that they *must* be so construed. The

next case relied upon was *Simpson v. Hornsby* (a). In that case the testator had a wife, and two daughters, his heirs at law, and he devised his estates to his wife for life, and then to one of his daughters after the death of his wife. Now a devise to an heir at law after the death of the wife, gives the wife a life estate by necessary implication, because the intent is plain that the heir shall not take till after the death of the wife (b). The case of *Hutton v. Simpson*, as reported by *Vernon* (c), is cited in *Viner's Abridgment* (d) as an authority to shew, that a devise to one of two daughters, being heirs at law, after the death of the devisors wife, gives an estate for life to the wife by implication, though no mention is made of the other daughter and heir. But in that respect *Vernon's* report is at variance with that in the *Chancery Precedents* (e), and also with the account in the Register Book, which I have examined. According to the latter, the case was this:—*Thomas Addison*, the testator, had a wife, *Frances*, and two daughters, *Bridget* and *Jane*. He devised to *Frances Addison*, for her life, as a jointure, all his messuages, houses, lands, tenements and rents in Turpentine, in the county of Cumberland, (the house called James House, and the lands devised to buy bread weekly for the poor of the parish only excepted,) and bequeathed to her specific articles of furniture, &c., all which he bequeathed to her, and were thereby intended and declared to be in full of her jointure, and in lieu of her dower, or thirds, at common law or in equity, or by any local custom; and after the death of his said wife, devised all his houses, messuages, lands, tenements, rents, fines, heriots, boons, duties, and services, in Turpentine aforesaid, (except as before excepted,) and all his houses,

(a) Prec. in Chan. 439, 452.

(b) If a husband devise the goods in his house to his wife, and that after her decease his son shall have them, and his house; though the house be not devised to the wife by express words, yet it has been held, that she has an estate

for life in it by implication, because no other person could then have it, the son and heir being excluded, who was to have nothing till after her decease. 1 Vent. 228.

(c) 2 Vern. 723.

(d) 8 Vin. Abr. 355, pl. 29.

(e) Prec. in Chan. 439, 452.

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messuages, lands and tenements in Whitehaven, his tenements in Bigg Croft, and all other his real estate whatsoever, not before devised, unto his daughter *Bridget Addison*, and the heirs of her body to be begotten; and, for want of such issue, to the said *Jane*, his daughter, for her life, and after her decease to the first, second, third, &c., sons of his daughter *Jane*, and the heirs of the body of such son and sons successively; and, for default of such issue, to the daughter and daughters of the said *Jane*, the wife of *Simpson*, and the heirs of the body of such daughter and daughters, as tenants in common, and not as joint tenants; and, for want of such issue, to the said *Thomas Addison's* right heirs for ever; and he made the said *Bridget Addison*, his daughter, sole executrix, and the defendants *Gilpin*, *Blacklock*, *Coates*, and *Senhouse*, overseers of his will. *Bridget* married *Hutton*, and had issue *Addison Hutton*, and died in the testator's lifetime. *Jane* married *Simpson*. After the testator's death, *Simpson* and his wife filed a bill against *Frances* the widow, and the overseers of the will, charging, that *Frances*, pretended she was entitled not only to the lands in *Turpentine*, but to all the testator's other lands for life, and that she possessed the title deeds of his real estate, and refused to discover the same; and pretended also, that after her death *Addison Hutton* would take as heir of *Bridget's* body; and prayed, *inter alia*, an account of the rents of the real estate. *Frances* put in her answer, but died before the hearing; and the suit was revived against her executors. *Richard Hutton* and *Addison*, his son, also filed a bill against *Frances Addison* and the overseers of the testator's will, and prayed that *Richard Hutton* might have the management of the lands given to *Bridget* and the heirs of her body. This bill was also revived on the death of *Frances*. On the hearing of both causes, Lord Chancellor *Cowper* was of opinion that *Frances* took nothing by implication, and that she was entitled to a life estate in those lands only which were expressly devised to her; that *Bridget*, had she survived the testator, would have taken the other lands immediately upon the testator's death, and that she was to

wait for the death of *Frances* for those lands only which were given to *Frances* for life; and that as *Bridget* died in the testator's lifetime, *Jane* became entitled to the lands not expressly devised to *Frances*, immediately upon the testator's death, and might have entered thereon; but as she had not entered, he refused an account against the personal estate of *Frances*, and dismissed the first bill; and as *Jane* had profited so much by an unforeseen accident, the Lord Chancellor left *Jane* to her remedy at law against the *Huttons*, for an account of rents, and retained *Hutton's* bill, that he might, if he thought fit, try the title at law; and if he did not, the deeds were to be delivered to *Jane*: but the Lord Chancellor stated that the present title to the estate was merely a question of law, and that there was no impediment to try it at law. The only question was, not whether the estates had come into the possession of *Jane*, but whether there ought to be an account of the rents and profits. In the first case the Lord Chancellor thought that, *Simpson* not having entered, he and his wife were not entitled to an account; and he dismissed the bill on that ground. The question, therefore, whether *Jane* was entitled to the actual possession upon the death of *Frances*, the tenant for life, could not arise; and there could be no appeal against the decree upon the ground of any opinion expressed by the Lord Chancellor as to the period of time when the property vested. In the other case the bill was dismissed as to the rents and profits, because as *Jane* had profited so much by an accident unforeseen to the testator, it was thought that she might properly be left to recover them at law. Neither of those cases, therefore, necessarily involved the question, whether the devisee took an estate immediate upon the death of the testator. It was contended that the son of *Bridget* was entitled to the estate at the death of his mother; but the Lord Chancellor was of opinion that the words "heirs of the body," as used in the will, were used only as words of limitation of the estate devised, and not as words of purchase or description of the person in-

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tended to take, and therefore, that *Addison Hutton* could not, by virtue of those words, take by purchase or immediate devise; and, consequently, that the estate devised to *Bridget* and the heirs of her body vested immediately on the death of the testator (*Bridget* being previously dead) in *Jane*. A question was made whether *Jane* was so entitled, and it was contended that she was not entitled until after the death of *Frances*, the widow, because *Frances* took an estate for life by implication in the whole. The Lord Chancellor thought that *Frances* took no estate by implication in the lands not expressly devised to her, and that *Bridget* took a remainder in those lands only which were expressly devised to *Frances*; *the other lands being clearly intended to pass by the will immediately to Bridget, if Bridget survived the testator*. It is evident from this statement of that case, that the Lord Chancellor was of opinion that the widow took no estate by implication in the lands not expressly devised to her, but that those lands were *intended to pass by the will immediately to Bridget*; and that in order to give effect to that intention, he construed the words of the devise distributively, reading the devise as if the testator had given specific lands to his wife for life, and after her death to *Bridget*; and as if he had given his other lands immediately to *Bridget*, without any qualification or contingency; and his ground for distributing the words was, that there was a necessity for so doing, in order to effect the intention of the testator, apparent upon the face of the will, that those lands should pass immediately to *Bridget*. The same observation applies to the remaining case of *Doe v. Brazier* (a). There the testator bequeathed the rents of a dwelling-house situate in New Brentford to *Charles Brazier* for his life, and after his decease he bequeathed the same rents, *together with* the rents of all his other messuages and lands, to his three nephews and niece, for their lives and the life of the survivor, share and share alike; and after the decease of the survivor of them, he devised all his messuages and lands to trustees in trust to sell the same, and

(a) 5 B. & A. 64.

pay over the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor of them; and then devised all the residue of his estate to *Charles Brazier*, to hold to him, his heirs and assigns for ever. It was held, that on the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor in the rents of all the houses and lands, except the house specifically bequeathed to *Charles Brazier* for his life. The ground of that decision was, that it was apparent, on the face of the will, that although the testator intended to give *Charles Brazier* a life estate in one house only, he yet intended to dispose of his property in the other houses, which latter intention could only be effected by giving to the nephews and niece an immediate interest in the other houses; and therefore the Court, in order to effect the manifest intention of the testator, were compelled to give to the words a construction different from that which belonged to them in their ordinary grammatical sense. In the present case there is nothing in the will to shew that the testator intended to give his grandchildren upon his death an immediate interest in the property devised, or that he meant to disinherit his heir at law; and that being the case, we must construe the words of the will in their ordinary grammatical sense. Upon this principle we are of opinion that the pauper did not take an immediate estate under the will of his grandfather; that he is entitled to no estate whatever until the tenant for life dies; and therefore, that, as he had no present interest at the time when he resided at Ringstead, which, in order to acquire a settlement, it is clear from *Rex v. Eatington* (a) and other authorities, he must have, he gained no settlement by his residence in that parish. The removal to Ringstead, therefore, was wrong, and the order of sessions confirming it must be quashed.

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Order of Sessions quashed (b).

- (a) 4 T. R. 177; ante, 68, (b). Jac. 75; Butler's note to Fearn  
(b) Vide *Horton v. Horton*, Cro. C. R. Introduction.



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**The KING v. The MERSEY and IRWELL NAVIGATION  
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Certain persons, under the authority of an act of parliament, make navigable, clear, cleanse, scour, open, enlarge and straighten, a river, dig and cut banks, erect weirs, locks and dams, make new cuts and trenches through lands adjoining, which they purchase, and make towing paths over land partly purchased and partly rented by them:—Held, that they are not ratable as occupiers of the river or of the land taken for the purposes of the navigation, but that they are ratable for the new cuts and trenches, and for the weirs, locks and dams, erected on their own land.

**THE** churchwardens and overseers of the poor of the township of Barton-upon-Irwell, in the county palatine of Lancaster, by an assessment duly made and allowed, assessed the company of proprietors of the Mersey and Irwell Navigation to the relief of the poor of the said township in the following form:—

Owners' Names.	Occupiers' Names.	Description of Property.	Annual Value.	Rate in the Pound.
The Company of Proprietors of the Mersey and Irwell Navigation.	Ditto.	For land taken and used for the Mersey and Irwell navigation, towing paths, locks and tonnage arising therefrom.	£2908 7s. 6d.	£454 8s. 7½d.

This rate was appealed against at the sessions for the county palatine of Lancaster, held by adjournment at Salford in the said county, on the 13th day of July, 1827, when, on the ground that the amount of tonnage was overvalued, the rate was amended by reducing the above sum of 2908*l.* 7*s.* 6*d.* to 2600*l.*, subject to the opinion of the Court of King's Bench on the following case:—

By an act of parliament, passed in the seventh year of the reign of King George I., entitled, "An Act for making the rivers Mersey and Irwell navigable from Manchester to Liverpool, in the County Palatine of Lancaster," certain persons therein nominated as undertakers, their heirs and assigns, were authorised and empowered, at their proper costs and charges, to make the said rivers Mersey and Irwell navigable, portable and passable, for boats, barges, lighters and other vessels, from Liverpool to a place called Hunt's Bank, in Manchester, and from time to time to continue, maintain, support and use such navigation by themselves or others, in such manner in, by, through and

upon the said rivers, as they the said undertakers, their heirs or assigns, should think fit, and for those purposes to *clear, scour, open and enlarge, or straighten the said rivers Mersey and Irwell, and to dig or cut the banks of the said rivers Mersey and Irwell, and to make any new cuts, trenches or passages for water, in, upon and through the lands and grounds adjoining or near unto the said rivers Mersey and Irwell*, or either of them, as should be necessary and proper for the navigation and passage of boats, barges, lighters or other vessels, and any ways necessary for the more convenient, easy and better carrying on and effecting the said undertaking, *be it the soil or ground* of the king's most excellent majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate whatever, and if necessity required to cut, remove and take away all trees, roots of trees, gravel beds or any other impediments whatsoever which might any ways hinder navigation either in sailing, haling, towing or drawing boats, barges, lighters and other vessels, with men or horses or otherwise upon the said rivers Mersey and Irwell, or upon any new cuts, trenches or passages so from time to time to be made, and to lay the same on any lands thereto adjoining, and to build, erect, set up and make, in, over or on the said rivers or lands adjoining or near to the same, or to the said new cuts, trenches or passages so to be made, or any of them, such and so many bridges, sluices, locks, weirs, pens for water, stakes, dams and other works as should be necessary and convenient, where they, the said undertakers, their heirs or assigns, should think fit, and from time to time when and so often as should be proper and convenient to alter, repair, increase, enlarge and amend the same, and to make, have and use necessary ways, passages and other conveniences for the carrying and conveying of any goods, wares, and merchandizes or other things in, upon, to or from the said rivers, passages, trenches or cuts, and for carrying and conveying of any goods, wares, merchandizes or other things, in, upon, to or from the said rivers, passages,

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trenches or cuts, and for carrying and conveying of all manner of materials for perfecting, completing, and finishing the said works and navigation, and for altering, repairing and amending the same, and to lay and work the said materials on the ground near to the place or places where the said works, or any of them, was, were or should be made, erected or done, and to amend, heighten or alter any bridge, or to turn or alter any highways, in, upon or near unto the said rivers Mersey and Irwell, cuts, trenches or passages aforesaid, and to pull down, alter or demolish any mill, weir or other obstruction in, upon or contiguous to the said rivers, cuts or passages, which might obstruct or hinder the navigation or passage thereon, and to appoint, set out and make towing paths, banks and ways for towing, haling or drawing of boats, barges, lighters and other vessels passing in, through and upon the said rivers, or the cuts, trenches, or passages to be made as aforesaid, or any of them, and from time to time, and at all times thereafter, to do all other matters or things necessary or convenient for making, maintaining, continuing and perfecting the navigable passages of the said rivers Mersey and Irwell as aforesaid, or for the improvement or prosecution thereof, the said undertakers, their heirs or assigns, doing as little damage as might be. *And first giving satisfaction to the respective owners or proprietors of such mills, weirs, lands, tenements or hereditaments as should be pulled down, demolished, altered, dug up, cut, removed, or otherwise made use of, or that in any wise should be prejudiced or damaged by or for carrying on, effecting, preserving, continuing or maintaining the said navigation, and also giving satisfaction for all damage that should be done to the grounds near to the place or places where the said works, or any of them, was, were or should be made, erected or done, by carrying, laying or working any materials thereon, according to the intent and meaning of that act, as was thereafter in and by that act directed and appointed.*

And it was thereby further enacted, that for and in con-

sideration of the great charges and expenses the said undertakers, their heirs or assigns should be at, not only in making the said rivers Mersey and Irwell navigable as aforesaid, but also in making, erecting, repairing, cleansing, maintaining, keeping up and continuing the weirs, works, locks, dams, sluices, bridges and other matters necessary to be made and erected as aforesaid, it should and might be lawful to and for the said undertakers, their heirs and assigns, and no others, from time to time, and at all times thereafter, to ask, demand, receive, recover and take *to and for their own proper use and behoof*, in respect of the charges and expenses aforesaid, for all and every such coal, cannel, stone, timber, and other goods, wares, merchandizes and other commodities whatsoever, as should be carried or conveyed in any boat, barge, lighter or other vessel, in, upon, to or from any part of the said rivers Mersey and Irwell, between Bank Key and the said place called Hunt's Bank in Manchester aforesaid, such rate and duty, rates and duties, for tonnage over and besides what should or might be paid for freight or carriage of the said goods, as the said undertakers, their heirs or assigns, should think fit, not exceeding 3s. 4d. for every ton of such coal, cannel, stone, slate, timber, or other goods, wares, merchandizes and commodities, and so proportionably for every quarter, or less quantity or weight, the same rate and duty, rates and duties, to be paid at such place or places near to the said river, and in such manner as the said undertakers, their heirs or assigns, should think fit.

And after reciting that it would be necessary in some places to hale and tow up and draw up the said rivers the said boats, barges, lighters and other vessels, by the strength of men, horses, engines and other means in that behalf convenient, it was therefore thereby further enacted, that it should and might be lawful to and for the said undertakers, their heirs and assigns, their agents and workmen, servants, helpers and assistants, to set up and for them, and the boatmen, bargemen and watermen passing or navi-

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gating in or upon the said rivers Mersey and Irwell, or in or upon any cuts, streams or passages that should be made use of as aforesaid, winches and other engines, in convenient places, and by and with the same, by strength of men, horses or beasts, going upon the said banks or lands near to the said rivers, streams, cuts or passages, in convenient manner, without the least hinderance, trouble, or interruption of any person or persons whatsoever, to draw, tow or hale, up or down the said rivers, the said barges, boats or other vessels. And it was thereby further enacted, that the said undertakers, their heirs or assigns, should, (where wanting,) at their own costs and charges, make, set up and from time to time maintain convenient gates and bridges, passages and stiles, in all the hedges and fences in the towing paths and ways to be set out as aforesaid, and over the new cuts, trenches and passages for water so to be made, where necessary for the occupiers of lands, tenements and hereditaments thereunto adjoining to come at their lands for the use and occupation of the same, in such manner as the said commissioners, or any seven or more of them, should from time to time order and direct, and should not remove any bed of sand, or gravel pits, or other things for preserving of fords, nor in any sort hurt, obstruct or destroy any bridges, highways, common, public or private, usual fords or passages over the said rivers, or either of them, until such time as they should first, at their own costs and charges, have made up and perfected such other conveniences for passing of the same, at or near the same places as should be as convenient to pass over the said rivers, or either of them, as the said commissioners, or any seven or more of them should adjudge proper, notice being first given to all the acting commissioners of the time and place of the meeting to adjudge and determine of such conveniences to be made as aforesaid, at least twenty days before such meeting, and all such conveniences so to be made should from time to time be maintained in good and sufficient repair by the said undertakers, their heirs or assigns,

And it was thereby further enacted, that if the said undertakers, their heirs or assigns, should, in pursuance of the powers given by the said act, raise the water in the said rivers Mersey and Irwell above its ancient or usual height, whereby the adjacent lands might be more liable to be overflowed or damaged than they had formerly been, that then they, the said undertakers, their heirs or assigns, should, at their own proper costs and charges, from time to time cause the banks of the said rivers, and of all such streams, trenches or brooks as come into the said rivers, or either of them, to be proportionably raised, heightened and strengthened in all parts where need should require, so as the new banks should be able and sufficient to contain the water at such its raised height, and also should, from time to time, maintain and repair the said banks as often as occasion should require; and if the said undertakers, their heirs or assigns, in pursuance of the powers aforesaid, should make any new cuts, trenches or passages for water, by reason whereof, or by means of the navigation to be made and effected as aforesaid, any person or persons should not have convenient ingress or egress into or out of his, her or their respective lands, tenements or other hereditaments, or any part thereof, as he, she or they before that time had, or as occasion should require, that then and in such case the said undertakers, their heirs and assigns should, at their own proper costs and charges, make, erect and from time to time maintain, such sufficient bridge or bridges, or other sufficient passages over and near unto every such new cut, passage or trench, as by the said commissioners, or any seven or more of them, should be directed. And it was thereby further enacted, that the said rivers Mersey and Irwell were, and for ever thereafter should be, esteemed and taken to be navigable from Liverpool aforesaid to the said place called Hunt's Bank in Manchester aforesaid, and that all the king's liege people whatsoever, with their goods and merchandizes, might have and lawfully enjoy their free passage in, along, through and upon the

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said rivers Mersey and Irwell, or any part thereof between Liverpool aforesaid and the said place called Hunt's Bank in Manchester aforesaid, with boats, barges, lighters and other vessels, and also all necessary and convenient liberties for navigating the same without any let, hinderance or obstruction from any person or persons whatsoever, paying such rate and duty, rates and duties, as were by that act appointed to be paid to the said undertakers, their heirs or assigns. And after reciting that the said river Mersey had been theretofore and then was navigable from Liverpool to Bank Key, it was further enacted that all goods and merchandizes (as theretofore the same had been) should be and remain free and exempted from paying any toll, duty or tonnage to the said undertakers, their heirs or assigns, between Liverpool and Bank Key aforesaid.

By another act of parliament, passed in the 4th year of the reign of King Geo. 3, entitled "An Act for altering an Act passed in the 7th year of the reign of his late Majesty King Geo. 1, entitled An Act for making the rivers Mersey and Irwell navigable from Liverpool to Manchester, in the county palatine of Lancaster, by incorporating the proprietors of the said navigation and to declare their respective shares therein to be personal estate," the then proprietors and undertakers were incorporated by the name of "The Company of Proprietors of the Mersey and Irwell Navigation," and invested with the same powers as were given by the former act.

The said appellants, and the undertakers from whom they derive their title, have at very heavy costs and charges, and in pursuance of the powers granted to them by the said act, made and maintained and still do maintain and continue navigable the said rivers from Liverpool to Manchester. They have made (and kept in order, by repairing with gravel and sand) towing-paths by the side of the whole line of navigation, by cutting away the brows, levelling the lands, and erecting bridges over brooks and ditches crossing the

towing-paths. They pay rent for the towing-paths along some parts of the line; wherever they have not bought land they pay rent for the towing-paths. The towing-paths are not fenced off from the adjoining lands except in a few places, and in these instances the fences have been made and maintained by the owners of the adjoining land and not by the appellants, but gates have been erected by the company at the fence between adjoining fields where the landholders have required it to prevent the cattle trespassing, and such gates are maintained by the appellants. The banks between the river and the towing-path have been repaired sometimes by the appellants, but chiefly by the landowners, who have in that case been supplied by the appellants with stone and materials at a low price, to induce them to make such repairs. When the navigation is impeded, the appellants scour and dredge the river, applying the gravel and sand so taken out to the repairs of the towing-paths, and selling the surplus when they have more gravel or sand than is necessary for that purpose. In several parts of the navigation the appellants have made new navigable cuts, connecting different parts of the river. Three such cuts, of the breadth of eight yards each, and being altogether 938 yards in length, have been made and now are used by the appellants in the township of Barton-upon-Irwell. The land necessary for these cuts belongs to the appellants and was taken by them under the powers of the act, and compensation made to the landowners pursuant thereto. The length of the navigation within the township of Barton-upon-Irwell is 9 miles 7 furlongs. Six miles and a half of the towing-path is within the township of Barton-upon-Irwell, and the residue thereof is in another township.

There are several rivers and locks on the navigation erected and maintained by the appellants within the township of Barton-upon-Irwell, and the surplus water held up by one of their weirs is taken from the appellants by the proprietors of a neighbouring mill, who pay an annual rent to the

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appellants for it. A very large traffic is carried on along the navigation in flats and other vessels, belonging in part to the appellants, and the residue to other persons, who employ them in the carriage of goods between Manchester and Liverpool. The tonnage actually received by the appellants from the other persons, together with the tonnage which would be received by them if the vessels so employed by themselves were the property of other persons, amounts to a large sum, and the proportion thereof payable in respect of the length of the navigation and towing-paths in the township of Barton-upon-Irwell, amounts to the sum of 2600*l*. The appellants contended that they were not ratable at all for or in respect of the property rated, or if ratable at all, that they were only ratable for and in respect of the cuts, and not in respect of the rest of the navigation and towing-paths, and that in such case they ought only to be rated in the proportionate part of the said sum of 2600*l*., which should be considered payable in respect of the length of the said cuts, and further, that they were not ratable for tonnage upon their own vessels, which paid no such duty. But the Court of Quarter Sessions held that the appellants were liable to be rated for the whole line of navigation within the township of Barton-upon-Irwell in respect of the land taken and used by them for the Mersey and Irwell navigation, the towing-paths, weirs, locks, cuts and sluices, but assessed the annual value of the profits at 2600*l*., and ordered the sum to be reduced accordingly. It is agreed that the several acts of parliaments for making and regulating the said navigation shall be taken as part of this case, and may be referred to as such.

*Courtney, Starkie and Armstrong*, in support of the order of sessions. The appellants are rated in respect of four things, viz. lands taken and used, towing-paths, weirs, locks and sluices, and the new cuts. As to the new cuts, the appellants stand in the same situation as any other canal

company. The case finds that the land taken for the cuts belongs to them. They are ratable in respect of the wears, locks, and sluices, *Rex v. Macdonald* (a), *Rex v. Cardington* (b). So for the towing-paths, *Rex v. The Mayor of London* (c). They are liable for land taken and used for navigation. The case finds that the appellants have made and maintained, and continue navigable, the said rivers from Liverpool to Manchester. They scour the river and sell the gravel. They have exclusive possession, with slight exceptions in favour of pleasure boats and boats with manure. The appellants cut away mounds. They bought land for some towing-paths. The act of parliament makes this a public navigable river, and the appellants will probably avail themselves of this circumstance to contend that this is like a highway. They will perhaps insist that this was not a beneficial occupation, and will rely upon the clause in the act which makes the navigation a highway. The reason why trustees of turnpike roads are not rated is, that they are not beneficial occupiers; it being provided by the general turnpike act that they shall not directly or indirectly derive any benefit. By the express provision of the turnpike act "the trustees are to lay into roads the land which they are directed to purchase" (d). This is very different from the language of these acts; in the first of which the words are, "to and for their own proper use and behoof" (e). The second act states that the trustees had done what they were to do. It was a condition precedent that they should make compensation. They must therefore have bought the land which constituted the bed of the river. If it be argued that they stand in the same situation as trustees, it is sufficient to refer to this act. [Sir J. Scarlett. It is not meant to be contended that the occupation was not beneficial. The ground taken by the appellants is, that

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(a) 12 East, 324.

(b) Cowper, 581.

(c) 4 T. R. 21.

(d) 3 Geo. 4, c. 126, s. 86.

(e) *Ante*, 87.

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they were not occupiers.] In *Rex v. Mayor of London* (a) it was said that the possession follows the property. It cannot be doubted that the appellants were in the actual occupation inasmuch as they took the tolls. *Rex v. Jolliffe* (b), though relied upon by the other side, is in truth an authority in favour of the respondents. The appellants are in the same situation as Sir John Eden was there. In *Rex v. Bell* (c) the exclusive use of a waggon way was held to be ratable. The case of *Rex v. The Weaver Navigation* (d) was cited at the sessions on account of a dictum of Mr. Justice Bayley, but there must be a mistake in the report of that case. The Court can only look to the occupation. If that case is accurately reported, it must be contended on the part of the respondents, that the soil was vested in them by 4 Geo. 3, (e). [Lord Tenterden, C.J. Could it be contended that the company was not ratable for the towing paths?] The case finds that such land as they did not buy they pay rent for. [Bayley, J. If they have only an easement, the party who has the possession of the soil is alone ratable. Lord Tenterden, C.J. The question then is, whether the company are the occupiers of the river.] They are also ratable for the navigation. The first statute that speaks of purchase money, 4 Geo. 3, (e) enacts that the powers given by 7 Geo. 1, c. 15, shall be vested in the company of proprietors of the Mersey and Irwell navigation, and enables them to purchase lands &c. It is clear that the company had the power of purchasing. In *Hollis v. Goldfinch* (f) the undertakers of the navigation had no power to purchase lands, nor did the act recognise in them any right of soil in the beds or banks of the rivers intended to be made navigable, and for these reasons the Court held in that case that there was no ground for presuming a purchase, and that therefore tres-

(a) 4 T. R. 21.

(b) 2 T. R. 90.

(c) 7 T. R. 598.

(d) 7 B. & C. 70.

(e) *Ante*, 90.

(f) 2 D. & R. 316; 1 B. & C. 205.

pass quare clausum fregit was not maintainable. So in the *Duke of Newcastle v. Clarke* (a) the Court of Common Pleas held that commissioners of sewers had merely an authority, and not such a possessing interest as would entitle them to maintain trespass. But in *Dyson v. Collick* (b) the contractors for the completion of a navigable canal were held to have such a possession as would entitle them to maintain trespass. The statute of *Elizabeth* speaks of occupation. Occupation must be understood with reference to the subject-matter. Here it must mean the persons who have the substantial, beneficial and apparent occupation. To whom could the overseers look as occupiers? The appellants are the persons deriving profit from the navigation, and they are the persons who use the land so as to make it productive. The gas pipes at Rochdale, Bath, Brighton (c) and Birmingham, are all rated. The case of *Rex v. Jolliffe* (d) when examined is in favor of the appellants. In that case, the defendant had enjoyed the exclusive right of using a way-leave over land which he held in common with Mr. Milbanke, paying a certain sum yearly, and the privilege of using a way-leave which had been demised to Sir John Eden. Mr. Justice Ashhurst observes, "that it cannot be said that the defendant was an occupier of any thing, for all that he has is a concurrent right given him by Sir John Eden of making use of this way-leave at so much per ton for all the coals that he should carry, which is nothing more than a purchase of the liberty of carrying every ton of coals." Mr. Justice Grose says, "in order to support this rate the defendant must be rated either for the way or the land over which the way passes; but he cannot be rated for the latter, because the land must have been before rated in the hands of the occupier of that land. Neither is he liable to be rated for the former, because it is positively stated that he never made the waggon ways, which he had the power of

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(a) 8 Taunt. 602.

and Coke Company, 8 D. &amp; R. 308;

(b) 5 B. &amp; A. 600; 1 D. &amp; R. 225.

5 B. &amp; C. 466.

(c) *Rex v. Brighton Gas Light*

(d) 2 T. R. 90.

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doing under the leases, but by the consent of Sir *John Eden* he has used those way-leaves which Sir *John Eden* had made, and if any person could be rated for those way-leaves it would be Sir *John Eden*." Yet Sir *John Eden* clearly had not the soil. His lordship's only doubt therefore was whether a profit was made of the use of the soil. In *Rex v. Bell* (a) the defendants, who were grantees of way-leaves, had inclosed them, thereby excluding all other persons, which does not make a very material difference. If the Court are of opinion that the soil of the river is not vested in the company, yet if the whole is contributory to a gross profit, the whole is ratable. The rate must be entire. It is next to impossible to make an assessment apportioning the rate upon the different sources of profit. The cases shew that where land is contributory to a gross profit the whole must be rated. It seems to have been considered at first that tolls were ratable. When it was found that the occupation of land was necessary, the cases shew the nature of the occupation. In *Rex v. Nicholson* (b) the Court held that tolls must be connected with something real, and they seemed to have considered that making them payable at their own wharfs and warehouses was sufficient. In *Rex v. Macdonald* (c) the Duke of *Bridgewater's* trustees were held to be ratable as occupiers of a canal lock, tunnel dues or rates. In *Rex v. Ellis* (d) the lessee of the fishery was held to be ratable, and in *Rex v. Hogg* (e) a house and engine for carding cotton, because held at an entire rent, were held to be ratable. So here the appellants are ratable for the whole, it being one entire property. *Rex v. Bradford* (f). [Lord *Tenterden*, C.J. There the Court held that it was one office.] But *Hollis v. Goldfinch* (g) does not shew that trespass could not be maintained. Here they drag the river, make the walls, and sell the water.

(a) 7 T. R. 598.

(b) 12 East, 330.

(c) 12 East, 324; and see *Rex v. Coke*, 8 D. & R. 666; 5 B. & C. 797.

(d) 1 M. & S. 652.

(e) 1 T. R. 721; Cald. 266.

(f) 4 M. & S. 317.

(g) 3 D. & R. 216; 1 B. & C. 205.

Sir *J. Scarlett, J. Williams, Coltman and Aglionby*, contra.

The towing-paths perhaps present a difficulty, but the appellants object to the generality of the rate, which uses the word "tonnage" and "land taken and used," *Rex v. Rebowe* (a); *Rex v. Cardington* (b). It is impossible to state the law more clearly than is done by Lord *Ellenborough* in *Rex v. Nicholson* (c). Tolls are not, as tolls, ratable at all. Tolls in their nature are not capable of occupation. A man may have dominion over water appropriated for domestic or manufacturing purposes, and may maintain an action for a disturbance, but he can have no *occupation* of running water. A flowing river, the soil of which is not vested in the company, is not capable of such occupation by them as to render the company ratable, notwithstanding they have the tolls to their own use. In *Rex v. Palmer* (d), Lord *Tenterden*, in giving the judgment of the Court, says, that it is now fully established that tolls *per se* are not ratable. The proprietors of a navigation are therefore ratable only as the occupiers of the canal, or land covered with water, for their tolls, as profits arising out of that land so used, *Rex v. Trustees of the River Weaver* (e). It would be difficult to shew that the soil of the river Mersey was vested in the company. The soil is, in fact, vested in the Duke of Lancaster; and the soil of Irwell is vested in the owners of the adjoining lands. The acts done by the company, which are found in the case, are *prima facie* evidence of occupation, but when explained they amount to nothing. So where a builder is engaged in building a house, his acts would, unexplained, be evidence of a *seisin* in fee; and it would be the same with a person who was employed to build the custom-house (f). Here the act only gives the company a right of possessing easements over

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(a) 1 Const, 142, pl. 177; Cowp. 583; 1 Nol. 90.

(b) Cowp. 581; 1 Bott, 5th ed. 154, pl. 183.

(c) 12 East, 330.

(d) 2 D. & R. 793; 1 B. & C. 546.

(e) 7 B. & C. 70, n.

(f) In *Hiern v. Hiern*, 13 Ves. VOL. IV.

122, Lord *Eldon*, C., is represented to have said, "that possession was not even *prima facie* evidence of property in land." This is probably the mistake of the reporter; but the supposed dictum being placed in the margin, has found its way into the indexes, &c.

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the soil. No words in the act enable them to purchase the soil of the river, though there are words enabling them to purchase other lands. If this company is ratable in respect of the use of water running over land in the parish, some future age may rate balloons passing the air over the parish, on the ground that *cujus est solum ejus est usque ad cælum*. This is a most ungrateful rate, inasmuch as not a country gentleman perhaps would attend the sessions, the value of whose estate was not doubled by this navigation. Where turnpike roads are made, there is no occupation by the trustees, who merely receive compensation for the passage which they afford. The case finds that part of the rate is imposed in respect of boats belonging to the company, *Rex v. Leeds and Liverpool Canal Company (a)*. Upon the face of the case they have made an assessment for the amount of tonnage, upon a supposition that their own boats have belonged to other persons and paid tonnage. [Lord Tenterden, C. J. If the company occupy any one ratable property the Court should not quash the rate, but send it back to the sessions to be amended.] The Court must quash the rate, *Rex v. Dursley (b)*, *Rex v. Hogg (c)*, *Rex v. St. Nicholas, Gloucester (d)*, *Rex v. Corporation of Bath (e)*. The rate has never been paid. There can be no inconvenience therefore from quashing it.

LORD TENTERDEN, C. J.—I am of opinion that the company are not ratable for the navigation of the ancient river. The rate being made upon them as proprietors of the navigation, the order must be quashed. Of the new cuts the company are the actual purchasers, so are the locks. I say nothing about the towing-paths, because it is suggested that the facts are incorrectly stated. We ought to quash the order of sessions, and send back the case to the sessions for them to rate—if they can.

BAYLEY, J.—At first it struck me that the company were liable to be rated for the whole. As to the navigation

(a) 6 T. R. 53.

(d) 14 East, 609.

(b) 1 T. R. 721; Caldec. 266.

(e) 5 East, 325.

(c) Caldec. 262.

I think I was wrong. To bring them within the statute of *Elizabeth*, they must be *occupiers*. Being entitled to have banks to hold the water, I thought they were occupiers. But they can maintain no description of action which occupiers can (a). They have merely an easement. Here the soil of the ancient bed of the river does not belong to the company. They have only a qualified right. The soil remains in the original owners, and in their occupation. Where they make cuts under the power given them, and erect weirs, dams or locks, they are occupiers of the land where these stand. Upon the point whether the rate should be quashed or sent back for amendment, I think it ought to go down to the sessions to be amended by rating only such parts as are legally ratable, as otherwise you will reimburse for by-gone time by a rate upon those who are occupiers at the time of the second rate.

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LITLEDALE, J.—I am entirely of the same opinion. I think the navigation is not ratable. I rather think the rate should go back to the sessions. But for the circumstance mentioned I should have thought the rate should be quashed. I do not see how it is possible to say how much should be assessed for the towing-paths. In respect of the cuts, the amount may perhaps be ascertained; but with respect to the locks, one cannot say how much of the 2600*l.* should be put upon that part of the property, but that is for the justices.

PARKE, J.—This case has been argued with great ability. At last it resolves itself into this. Were the company the occupiers of the land? The older cases seem to have been decided upon a wish to extend the funds, and by looking into cases, instead of attending to the words of the act of parliament. In *Williams v. Jones* (b), the owner of a ferry was held not to be ratable for the tolls in the parish where they were collected, and where one of the *termini* of the ferry was situated, and on which the ferry boat was

(a) And see *Bussard v. Capel*, ante, ii. 197. (b) 12 East, 346.



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secured by means of a post in the ground (a). I think the company are not ratable for the bed of the river, but that they are ratable for the locks, the weirs, and the cuts. I do not see how this is distinguishable from the case of a ferry. They are not occupiers of the highway. They have merely a special power in it. There may be a difficulty in fixing the quantum of rate. That, however, is not for us but for the sessions.

Order of sessions quashed, the case to be remitted to the sessions to consider of amending the rate, to rehear and reconsider the same.

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BEESTON v. BECKETT and others.

A rule to set aside proceedings for irregularity was made absolute upon payment by the defendant of costs incurred subsequently to an offer to pay the costs occasioned by the irregularity.

ON the 24th January, *Wyburn* obtained a rule to shew cause why the declaration should not be set aside for irregularity. The irregularity complained of was, that common bail had not been filed for one of the defendants at the time the declaration was delivered. The defendants were nineteen in number, and one attorney had appeared for eighteen of them.

*Langslow* this day, on behalf of the plaintiff, admitted the irregularity; but produced an affidavit, stating that the rule to shew cause was not served until late in the evening of the 26th of January, although it had been obtained on the 24th; that on the 27th the plaintiff's attorney wrote a letter to the defendant's attorney, requesting to know the amount of the costs, and offering to pay them on account of the irregularity in the proceedings; and no answer having been returned to this letter, the clerk of the plaintiff's attorney called on the defendant's attorney in the evening of the 28th of January, to ascertain why no notice had been taken of the letter of the preceding day; that the clerk of the defendant's attorney admitted that the letter had been

(a) See *Peter v. Kendall*, 6 B. & C. 703.

received, but no answer sent; that the clerk of the plaintiff's attorney then offered 5*l.*, and requested the clerk of the defendant's attorney to take the costs out of it; but this he refused, and said, "the matter must take its regular course." It was now contended, on behalf of the plaintiff, that though the rule must be absolute on account of the irregularity, which was indisputable, yet that the Court ought not to throw the costs upon the plaintiff beyond the time at which the offer to pay had been made; for that it was evident the only object of the defendant's attorney was to increase the costs and to produce delay; and it was suggested, that the costs subsequently incurred should, with a view to preventing such conduct in attorneys in future, be paid by the defendant's attorney himself.

The Court made the rule absolute, on payment, *by the defendants* of all costs incurred subsequent to the offer to pay made by the plaintiff.

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**EJECTMENT** for divers messuages and lands in the several parishes of Chilsham and Lympsfield, in the county of Surrey. The demise was laid on the 10th of February, 1826. At the trial before Mr. Serjeant *Onslow* at Kingston, at the spring assizes, 1827 (*a*), a verdict was found for the plaintiff, subject to the opinion of this Court on the following case:—

*Philip Stanhope* being seised in fee of the premises in question, by indentures of bargain and sale and release, bearing date respectively the 25th and 26th May, 1790, between the said *Philip Stanhope* of the first part, *Elizabeth Daniel* of the second part, *Samuel Newnam* of the third part, *William*

Where a party who has an estate, and also a power, executes a deed which is defective under the power, but which would be good at common law, the estate will pass, though the party contemplated only an execution of the power.

An appointment directed to be signed, sealed, and delivered in

(*a*) Counsel for the plaintiff, *Marryat* and *Hutchinson*; for the defendants, *Taddy*, Serjt.

the presence of two credible witnesses, is not well executed if signed, sealed, and delivered in the presence of two persons, to one of whom an estate is appointed therein by way of remainder.

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*Daniel*, father of the said *Elizabeth Daniel*, of the fourth part, and *Charles Stanhope* and *Edward Daniel* of the fifth part, in consideration of a marriage then intended to be had between the said *Philip Stanhope* and *Elizabeth Daniel*, conveyed the premises to the said *Charles Stanhope* and *Edward Daniel*, and their heirs: To the use of *Philip Stanhope*, his heirs and assigns, until the marriage, and after the solemnization thereof: To the use of *Philip Stanhope* and his assigns for life: Remainder to trustees to preserve contingent remainders: Remainder to the use of *Elizabeth Daniel* for life: Remainder to trustees to preserve contingent remainders: Remainder to the use of the children of said marriage in tail, as *Philip Stanhope* and *Elizabeth Daniel* should jointly, by deed or writing, appoint, or as the said *Philip Stanhope* should appoint in the event of his surviving the said *Elizabeth Daniel*; and for want of any such appointment: To the use of all and every the child and children of the said marriage as tenants in common, and the respective heirs of their bodies; and failing the issue of such child or children: To the use of every other such child or children equally, and if only one, to that one in tail; and in default of such issue: To the use of the said *Philip Stanhope* in fee. On the 20th May, 1790, the marriage between the said *Philip Stanhope* and *Elizabeth Daniel* took effect. On the 22d October, 1801, the said *Philip Stanhope* died, leaving *Elizabeth Stanhope* his wife, and *Elizabeth Charlotte Stanhope* and *Eugenia Stanhope*, his two daughters and only children by the said *Elizabeth*, him surviving, and without having made or joined in the making of any appointment. *Elizabeth Charlotte Stanhope* died on the 22d of June, 1816, under age and unmarried. By bargain and sale and release, bearing date respectively 3 & 4 December, 1817, between the said *Elizabeth Stanhope* of the first part, the said *Eugenia Stanhope* of the second part, *Richard Greenland Denne* of the third part, and *Samuel Forster* of the fourth part, the premises were conveyed to *Denne* in fee to make a tenant to the *præcipe* of a

recovery: To the use of the said *Elizabeth Stanhope* and her assigns for life, and from and immediately after the decease of the said *Elizabeth Stanhope*: To the use of such person and persons, and to and for such estate and estates, uses, trusts, intents and purposes, and with, under, and subject to such powers, provisoes, conditions and restrictions, and with such remainders and limitations over, and charged and chargeable with such sum and sums of money, in such manner as the said *Eugenia Stanhope* had already at the execution of the said last-mentioned indenture directed, limited or appointed, given or devised the same, ~~or~~ should at any time or times thereafter direct, limit or appoint, give or devise the same, by any deed or instrument in writing, under her hand and seal, *to be executed by her in the presence of and attested by two or more credible witnesses*, and either with or without power of revocation and new appointment, or by her last will and testament in writing, or any codicil or codicils thereto, to be by her signed, sealed and published in the presence of and attested by three or more credible witnesses; and in default of any such declaration, limitation or appointment, gift or devise, and so far as any such should not extend: To the use of the said *Eugenia* and her heirs. In Hilary term, 1818, a recovery was suffered accordingly, and the parties entered and were seised accordingly. On the 2d of October, 1818, *Elizabeth Stanhope* died. On the 17th of November, 1818, the said *Eugenia Stanhope* intermarried with *John Keir*. By indentures of bargain and sale and release, bearing date respectively the 12th and 13th of November, 1818, and the indenture of release being made between *John Keir* of the first part, the said *Eugenia Stanhope* of the second part, and Sir *Edwin Francis Stanhope*, Bart. *Thomas Carter* and *Lawrence Keir*, of the third part, being a settlement made and executed previously to the marriage of the said *John Keir* and *Eugenia Stanhope*, it was witnessed, that in consideration of the said intended marriage, *and pursuant to, and by force and virtue, and in exercise and execution of, the power*

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and authority limited to the said *Eugenia Stanhope* by the said indentures of bargain and sale and release of the 3d and 4th of December, 1817, and the recovery suffered in pursuance thereof, and of all other powers and authorities enabling her in that behalf, she the said *Eugenia Stanhope*, by that deed or instrument under her hand and seal, and executed by her in the presence of the two credible persons whose names are thereupon indorsed as witnesses attesting the execution of the said indenture by her the said *Eugenia Stanhope*, did direct and appoint that the premises in the declaration mentioned should from thenceforth be and remain: To the uses, upon the trusts, and subject to the powers thereafter expressed concerning the same. It is also witnessed, that for the consideration aforesaid, and for a nominal consideration to the said *Eugenia Stanhope* paid by the said Sir *E. F. Stanhope*, *T. Carter*, and *L. Keir*, the said *Eugenia Stanhope*, with the consent of the said *John Keir*, did bargain, sell, and release unto the said Sir *E. F. Stanhope*, *T. Carter*, and *L. Keir*, among other lands, the premises in the declaration mentioned: To hold the same with the appurtenances unto the said Sir *E. F. Stanhope*, *T. Carter*, and *L. Keir*, and their heirs, to the uses, upon the trusts, and subject to the powers thereafter expressed concerning the same. And it was declared that the direction, limitation and appointment, and the grant, release and confirmation therein contained should operate and enure: To the use of the said *Eugenia Stanhope* and her heirs until the marriage, and after the solemnization thereof: To the use of the said *John Keir* for life, or until he should commit an act of bankruptcy or become insolvent, or do any other act whereby his life estate would be forfeited or vested in any other person: Remainder to the use of the said Sir *E. F. Stanhope*, *T. Carter*, and *L. Keir*: Upon trust to preserve contingent remainders: And upon further trust, during the life of the said *John Keir* and *Eugenia Stanhope*, to pay the rents, issues and profits of the said premises to the said *Eugenia Stanhope*, notwithstanding her coverture;

and in case of the decease of the said *Eugenia Stanhope* in the life-time of the said *John Keir*, then: Upon trust, in case of any such bankruptcy or insolvency during the joint lives, and any issue of the said intended marriage, to pay and apply the rents and profits for the maintenance of the said *John Keir* and issue of the said marriage; and in case of the death of the said *Eugenia Stanhope*, and failure of issue of her by the said *John Keir* during his life, then from and after her decease and such failure of issue: In trust to pay the rents and profits to the said *John Keir* for life, and after the decease of the said *John Keir* to the use of the said *Eugenia Stanhope* and her assigns for life: Remainder to trustees to preserve contingent remainders: Remainder to the use of the children of the said intended marriage, as the said *John Keir* and *Eugenia Stanhope*, or the survivor of them should direct or appoint by deed or will, or in default of such appointment, to the use of all and every the children of the said *John Keir* by the said *Eugenia Stanhope*, as tenants in common, and the respective heirs of their bodies, and failing the issue of such child or children, to the use of every other such child or children equally, and if only one, to that one in tail; and for default of such issue, if the said *Eugenia Stanhope* should survive the said *John Keir*: To the use of the said *Eugenia Stanhope*, her heirs and assigns; but if she should die in the life-time of the said *John Keir*: To such uses, upon and for such trusts, intents and purposes, with, under and subject to such powers, provisoes and declarations as the said *Eugenia Stanhope* should, notwithstanding her coverture, by her last will and testament in writing, or any codicil or codicils to the same, signed and published by her in the presence of, and to be attested by, three or more credible witnesses, appoint; and in default of such last-mentioned appointment, and so far as any such appointment should not extend: To the use of the said *Charles Stanhope* in fee. The last stated indentures of the 12th and 13th November, 1818, were executed by the said *John Keir* and *Eugenia*

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*Stanhope*, and each of them attested by *Charles Stanhope* and *Peter Townsend*, *Charles Stanhope* being the person to whom the ultimate remainder is limited by the indenture of the 13th November, 1818. Their respective executions were proved at the trial of the ejectment by *Peter Townsend*. *Charles Stanhope* and *Peter Townsend* were the only persons attesting the execution of the deeds. The only issue of the marriage was one son, who died an infant in the year 1821. *Eugenia Keir* died the 16th May, 1823, leaving *John Keir* her husband. No will of *Eugenia Keir* was offered in evidence. *John Keir* died the 29th November, 1825. *Philip Stanhope*, the purchaser of, and who was seised of the premises in question, and who settled the property by the release of the 26th May, 1790, was born in England on the 21st January 1763; he was the son of *Philip Stanhope* (a) and *Eugenia Pieters*, and was born before the marriage of his parents. *Charles Stanhope*, to whom the ultimate remainder in fee was limited by the indenture of settlement of the 13th November, 1818, was also a son of the said *Philip Stanhope* and *Eugenia Pieters*, and was born in England in the year 1760, before the marriage of his parents. After the births of *Charles* and *Philip Stanhope*, the sons, as abovementioned, *Philip Stanhope* the father was appointed envoy extraordinary to his Britannic Majesty at the court of Saxony; and while residing at Dresden in that character, he, on the 25th September, 1767, intermarried with the said *Eugenia Pieters*, the ceremony having been performed according to the form of the French Reformed Church at Dresden. *Charles Stanhope* is still living. *Edward Daniel*, the lessor of the plaintiff, is the uncle and heir at law, *ex parte maternâ*, of *Eugenia Keir*, and entitled as such to recover the premises in question for default of heirs *ex parte paternâ*, unless, (as alleged by the defendant,) first, the subsequent marriage of the parents of *Charles* and *Philip Stanhope* rendered their children

(a) Natural son of Philip Dormer (Stanhope) fifth Earl of Chesterfield, and the person to whom the "Letters" were addressed.

born before such marriage legitimate and capable of inheriting land in England; or, secondly, the indenture of the 13th November, 1818, was well executed and attested under the power contained in the release of the 4th December, 1817; or, thirdly, (if it were not a good execution of the power,) the indentures of lease and release of the 12th and 13th November, 1818, conveyed the premises in the declaration mentioned, and all the estate and interest of the said *Eugenia Stanhope* in the same, and the said *Charles Stanhope* became, in the events that have happened, entitled to the same in fee. If the Court shall be of opinion that the plaintiff is entitled to recover, the verdict is to stand; if not, a nonsuit is to be entered.

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*Hutchinson*, for the plaintiff. The first point presents no material difficulty. [Lord *Tenterden*, C. J. It is not even stated that by the law of Saxony the issue would have been legitimate (a).] As to the second point, *Charles Stanhope* was not a credible witness. In *Smith v. Blackham* (b) it was ruled by Lord *Holt*, that though an heir at law may be a witness, a remainderman cannot. [Lord *Tenterden*, C. J. We need not trouble you to argue that.] So a party taking a beneficial interest under a will is not a good attesting witness, *Hilliard v. Jennings* (c). [Lord *Tenterden*, C. J. An act (d) passed to remedy that incon-

(a) Supposing that the Court would have taken judicial notice that the canon law is the common law of Europe in respect of marriage, (see *Dalrymple's* case by *Dodson*.) still it ought to have been shewn that the subsequent marriage of *Philip Stanhope* the elder and *Eugenia Pieters* took place under circumstances which would give to it the effect of legitimating antenuptial children; as that both parties were capable of contracting marriage with each other at the time of the procreation of the children, who were to be thus legitimated. This qualifica-

tion of the general rule is thus expressed by Alexander III.:—*Si autem vir, vivente uxore suâ, aliam cognoverit et ex eâ prolem susceperit, licet post mortem uxoris eandem duxerit, nihilominus spurius erit filius, quoniam matrimonium legitimum inter se contrahere non potuerunt.* Though one species of impediment only is here mentioned, the principle applies to other cases.

And see *Pothier, Traité du Contrat de Mariage*, No. 411.

(b) 1 Salk. 283.

(c) 1 Ld. Raym. 505.

(d) 25 Geo. 2, c. 6, which pro-



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venience. At present you may leave that part of your case.] It will be contended that there is a conveyance of

vides, (sec. 2,) "that if any person shall attest the execution of any will or codicil to whom any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate, other than and except charges on lands, tenements, or hereditaments for payment of any debt or debts, shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void; and such person shall be admitted as a witness to the execution of such will or codicil within the intent of the said act, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will or codicil." Though the preamble of the statute states a doubt which relates only to wills of land, its provisions were held by *Grant*, M. R., to extend to wills of personalty also, *Lees v. Summersgill*, 17 Ves. 509. In a subsequent case, however, Sir John Nicholl held, that the statute, in point of true construction, is, by reason of the preamble, limited to wills and codicils of *real* estate, *Brett v. Brett*, 3 Addams, 210; where it was stated that the contrary decision of the Master of the Rolls, in *Lees v. Summersgill*, proceeded upon the ground of misinformation as to the construction put upon the act in Doctors' Commons. And see *Hesse v. Albert*, ante, iii. 406. It appears from a

note at the end of *Brett v. Brett*, that the administratrix appealed to the Court of Delegates.

The act does not provide for the case of a devise or legacy, &c. to the husband or the wife of an attesting witness. In such a case, therefore, the devise takes effect, but the witness remains incompetent. See *Hatfield v. Thorp*, 5 B. & A. 589.

The statute does not destroy a devise to the subscribing witness, *in trust*. *Phipps v. Pitcher*, 6 Taunt. 220, and 1 Maddocks, 144. Such a devisee would have been a competent witness before the statute, *Fountain v. Coke*, 1 Mod. 107; *Goss v. Tracy*, 1 P. Wms. 290. And see *Holt v. Tyrrell*, 1 Barnard. K. B. 12; *Lowe v. Jolliffe*, 1 W. Bla. 365; *Goodtitle v. Welford*, Dougl. 139; *Bettison v. Bromley*, 12 East, 250. See also *Weller v. The Governors of the Foundling Hospital*, Peake, N. P. C. 153; *Withnell v. Gartham*, 1 Esp. N. P. C. 322; *Rex v. St. Mary Magdalen, Bermondsey*, 3 East, 7, 12, 13.

The statute does not extend to witnesses called to support the will who are not attesting witnesses. But an executor, who, being a debtor to the estate, is interested in supporting the will *quoad* the personal estate, is not thereby precluded from being called as a witness to prove the sanity of the testator, upon the trial of a question as to a devise of the realty. *Doe d. Wood v. Tees*, 8 D. & R. 63; *S. C. per nomen Doe d. Wood v. Teage*, 5 B. & C. 335.

an interest as well as an execution of a power; but the main object of the deed was to execute the power. The parties do not merely refer to the power, but state the manner and way in which they execute it. "All other power and authority" must refer to the interest. The direction as to the mode of execution constitutes a condition precedent, and the objection cannot be answered without striking the clause out of the deed, or confining its operation to the execution of the power; but they are all parts of the same deed, and require to be executed in the manner prescribed. If the deed could operate as a common law proceeding, it would destroy the power, though the parties clearly mean to act under it. *Eugenia Stanhope* has thought fit to say, that to pass her interest a deed shall be executed in a particular manner. That being her will, the Court is bound to give effect to it. The uses of the release are controlled by the words of the power, upon the non-execution of which the use resulted to *Eugenia Stanhope*, and descended to her heir.

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Lord TENTERDEN, C.J.—The simple question for our consideration is, whether, when a party executes a deed manifesting an intention to execute a power, but containing words sufficient to pass an interest, if the deed cannot operate as an execution of the power, by reason of something which is immaterial in itself, it cannot enure as a conveyance of the interest—a question upon which no lawyer can doubt (*a*).

The other Judges concurred.

Postea to the defendant (*b*).

(*a*) And see *Cox v. Chamberlain*, 4 Ves. jun. 631; *Attorney-General v. Griffith*, 13 Ves. 580; Sugd. Power, chap. v. sect. 6, 4th ed. 297, 307.

the lessor of the plaintiff he was permitted to reargue the case himself in a subsequent term; but he was unable to induce the Court to alter their judgment.

(*b*) Upon the urgent request of

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*A.* buys goods of *B.* as for an unnamed principal. *B.* makes no inquiry, and debits *A.* with the amount. *B.* may afterwards elect the principal as his debtor.

So, where the principal resides abroad; unless it appear that the usage is in such a case to look to the agent alone.

*Semble*, that upon error from an inferior Court, notice cannot be taken of an irregularity in bringing the party into Court by attachment without a previous summons (*a*).

**ASSUMPSIT** for goods sold and delivered, in the borough court of record at Liverpool, called the Passage Court. Plea, non assumpsit. At the trial, nominally, before the mayor and bailiffs, but in fact before James Clarke, esq. the recorder, *Thomas M'Keene* stated that he was established in Liverpool as a general Scotch agent, and acted as agent for the plaintiff in error, who resided in Dumfries, in Scotland; that in March, 1823, he received from the plaintiff in error a letter, containing an order to purchase various goods, and amongst others a quantity of glass and earthenware; which letter, with the order, was produced by the attorney for the defendants in error, and was read in evidence as follows:—"Dumfries, 29th March, 1823. Annexed is a list of goods which you will procure and ship per Nancy. Memorandum of goods to be shipped: 12 crates Staffordshire ware; Crown window glass, 10 quarter boxes," &c. &c.; that he, *M'Keene*, provided himself with the goods mentioned in this letter, and that he got the glass and earthenware from the defendants in error, who were glass and earthenware dealers in Liverpool; that at the time he ordered the glass and earthenware, he saw *Fynney*, one of the defendants in error, and, to the best of his recollection, told him that he, *M'Keene*, had an order to purchase some goods, and that they were for the same house for whom he had purchased goods from the defendants in error the preceding year; and he also stated, to the

(a) *Vide tamen Pratt v. Dixon*, Cro. Jac. 108; *Ward v. Ellayn*, ibid. 261; *Gwinne v. Poole*, 2 Lutw. 935, 1560; *Moravia v. Sloper*, Willes, 30; *Williams v. Lord Bagot*, 5 D. & R. 719; 3 B. & C. 772; *ante*, iii. 21, n. In

error from one of the superior Courts, informality in *mesne* process is not assignable for error, but informality in the *first* process, or the absence of that first process, (want of an original writ,) may be assigned for error.

best of his recollection, that as he was a stranger to the nature of the goods, he hoped the plaintiff would let him have the same as before, to save him from blame by his employer; but he, *M'Keene*, did not shew the letter containing the order, nor did he mention the name of any principal; that he then either gave *Fynney* a copy of the order, or produced to him the original order, that *Fynney* might himself take a copy; that the defendants in error accordingly furnished the glass and earthenware, the amount of which, deducting the discount, was 193*l.* 7*s.* 8*d.* but without such deduction 219*l.* 10*s.*, and rendered invoices thereof to *M'Keene* headed thus: "Mr. *Thomas M'Keene* bought of *Davenport and Co.*;" that *M'Keene* entered the net amount (193*l.* 7*s.* 8*d.*) to the credit of the defendants in error, in an account with them in his books, and charged the same sum, with the addition of 2*l.* per cent. for the commission, to the debit of the plaintiff in error, in an account with him, which was according to his invariable course of dealing; and that he sent to the plaintiff in error a general invoice of all the goods purchased, comprising the glass and earthenware, but not mentioning the names of the defendants in error; that afterwards, in April, 1825, and before the credit for the goods had expired, *M'Keene* became insolvent, though up to the day of his stopping payment he was in good credit, and could have bought goods on trust to the amount of 20,000*l.* Whereupon the recorder, after stating the evidence, told the jury that, from the distance of time since the sale took place, there was some uncertainty in the evidence of *M'Keene* as to the precise words used by him to the defendants in error at the time he gave them the order for the goods; but it appeared to him, the recorder, upon the evidence, that the name of the plaintiff in error, as principal, was not then communicated or known to the defendants in error; and he directed the jury, that if they were of opinion that the name of the plaintiff in error, as principal, was mentioned by *M'Keene* at the time the order was given, or that the

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defendants in error then knew that the plaintiff in error was the principal, their verdict ought to be for the latter; but that if they were of opinion that his name was not mentioned by *M'Keene* at the time of the order's being given, and that the defendants in error did not then know that the plaintiff in error was the principal, and they did not think upon all the facts of the case, that the defendants in error at the time of the giving of the order knew who the principal was, so that they then had a power of electing whether they would debit the plaintiff in error or *M'Keene*, they ought to find a verdict for the defendants in error; and that although the defendants in error, at the time of the sale, might think that *M'Keene* was not buying upon his own account, yet if his principal was not communicated or known to them, that circumstance ought to make no difference in the case. 'Upon this, *Hall*, of counsel with the plaintiff in error, tendered a bill of exceptions, on the ground that the jury ought to have been directed that if they were satisfied that at the time of the giving of the order the defendants in error knew that *M'Keene* was dealing as an agent, although the name of the principal were not then communicated or known to them, they by afterwards debiting *M'Keene*, and rendering the invoices in his name, had elected to take him for their debtor, and precluded themselves from calling upon the plaintiff in error. The jury returned a verdict for the defendants in error, damages 219*l.* 10*s.*, and found as a fact that the letter containing the order was not communicated or known to the defendants in error. The mayor and bailiffs of Liverpool affixed their seals to the bill of exceptions, in which the preceding facts are set out; and judgment having been given in the Court below, a writ of error was brought returnable in this Court (a), and the misdirection of the

(a) The assignment of error was as follows: "That in the record and proceedings aforesaid, and also in the matters recited and contained in the bill of exceptions, and also in the giving the verdict upon the

said issue joined between the parties aforesaid, and also in the giving the judgment aforesaid, there is manifest error in this, to wit, that the said mayor and bailiffs before whom the said issue was tried be-

learned recorder, as appearing upon the bill of exceptions, was assigned for error.

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*Joy*, for the plaintiff in error. Where the seller knows that the buyer is the agent of another, and elects to make him his debtor, he cannot afterwards resort to the principal. On the other hand, if the purchaser deals in his own name, and the seller is ignorant that he is buying for another person, the latter may be sued for the price of the goods.

tween the parties aforesaid, by the said recorder, then and there upon the trial of the said issue directed the jury, by whom the said issue was tried, that if they were of opinion that the said John Thomson's name, as the principal, was not mentioned by Thomas M'Keene to the said John Davenport, Henry Davenport, Mountford Tynney, and Henry Pontigney at the time of the order being given, and that the said John Davenport, H. D., M. T., and H. P. did not then know that the said John Thomson was the principal; and that if they the said jury did not think upon all the said facts of the case, that the said John Davenport, H. D., M. T., and H. P., at the time of the order being given, knew who the principal was, so that they had a power of electing whether they would debit the said John Thomson or the said Thomas M'Keene, they the said jury ought to find a verdict for the said John Davenport, H. D., M. T. and H. P.; and that although the said John Davenport, H. D., M. T. and H. P. at the time of the sale might think that Thomas M'Keene was not buying the goods upon his own account, yet if his principal was not communicated or made known to them, that circumstance ought to make no difference; whereas the

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said mayor and bailiffs, by the recorder aforesaid, ought in that part of the direction to have directed the said jury that if they were satisfied that the said John Davenport, H. D., M. T. and H. P. at the time of the order being given, knew that the said Thomas M'Keene was buying the goods as an agent, even though his principal were not communicated or made known to them, they the said John Davenport, H. D., M. T. and H. P. by afterwards so debiting the said Thomas M'Keene and so rendering the said invoices, had elected to take him for their debtor, and had precluded themselves from calling upon the said John Thomson.

There is also manifest error in this, to wit, that the said direction of the said mayor and bailiffs, by the said recorder, above excepted to, was wrong in point of law.

There is also manifest error in this, to wit, that it appears by the said record that there issued out of the said borough court against the said John Thomson a precept to attach the body of the said John Thomson before such time as any writ or precept or summons, or other process, had been issued against the said John Thomson in the plea aforesaid."

*Vide ante*, 110, (a).

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[*Bayley*, J. This is a middle case.] It is submitted that it falls within the first proposition. In the case of a purchase made on behalf of a foreign merchant, the seller would have no right to look to the principal, *Patterson v. Gandasequi* (a). *Addison v. Gandasequi* (b) is to the same effect, though the marginal note is incorrect. (c) Here the vendor has elected to give credit to the broker. In order to constitute an election, it is not necessary that the party should have a minute knowledge of all the circumstances. In *Moore v. Clementson* (d) Lord *Ellenborough* distinguishes between a mere general knowledge that the party is a factor, and express notice that the party acts as a factor in the particular transaction. And in *Maans v. Henderson* (e), where a policy was effected by a broker in his own name, but the underwriter was at the same time informed that the property was neutral, this was considered a sufficient indication that the merchant acted as an agent, so as to preclude the broker from insisting upon the lien on the policy for his general balance.

*Patteson*, contra. The jury must have been of opinion that the principal was not known at the time of the contract. *M<sup>r</sup> Keene* was known to be a general Scotch agent, and not a merchant, and the purchase might have been made by him for any other house. The conversation between *Tynney* and *M<sup>r</sup> Keene* only showed that the latter was not purchasing on his own account. It should have been proved that the vendors knew that *M<sup>r</sup> Keene* was speaking of *Thomson's* house. This is a middle case, approaching nearer to the second proposition than to the first. Where the vendor knows who the real vendee is, and chooses to give credit to the broker, he is bound by his election; but

(a) 15 East, 62.

(b) 4 Taunt. 573.

(c) Instead of "*B. credits A.*" it should have been "*B. debits A.*"

(d) 2 Campb. 22. And see

*Drinkwater v. Goodwin*, Cowp. 251, 255, 256; *Hudson v. Granger*, 5 B. & A. 27.

(e) 1 East, 335.

in order to enable him to elect, it is necessary that he should know the name of the principal, as was the case in *Patterson v. Gandasequi* and *Addison v. Gandasequi*, in which cases the principal was present, and the seller did not choose to trust him. When both principal and agent go together, it is impossible to say that both could be liable without an agreement in writing. If the agent goes alone, it may perhaps be considered that the vendor trusts the agent for some time and the principal afterwards. Upon the point of election, the case is clearly with the defendant in error. Until the vendors know who the principal is, they cannot form any comparison or exercise any judgment. It is not pretended that anything has occurred between the principal and agent so as to alter the state of accounts between them. *Patterson v. Gandasequi*, and other cases, establish that where the principal is known, and credit is given to the agent, the vendor is bound to resort to the agent, and cannot sue the principal; but even this rule is not inflexible, *Wilson v. Hart* (a); though it is admitted, that in that case there were circumstances of fraud and collusion. In *Seymour v. Pychlau* (b) the principal point was, that an agent employed to purchase goods cannot sue his principal as for goods sold and delivered by him although he has been debited as purchaser by the original vendors; but in that case, *Abbott, J.* says, *Seymour* may have been a principal and purchaser as far as respects the original sellers, and yet an agent as between him and *Pychlau* the defendant. [*Bayley, J.* Here the principal is not within the jurisdiction.] *Moore v. Clementson* was a case where the factor sold as principal, and the purchaser was not allowed to set off a debt due to him from the factor, on the ground that before the whole of the goods were delivered, the name of the principal was disclosed; but the Court has since determined that under such circumstances a set-off may be well pleaded. Another error is assigned, namely, that the record states that the party was attached and not summoned. [*Bayley, J.* That is merely process.]

(a) 7 Taunt, 296.

(b) 1 B. &amp; A. 14.



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*Joy*, in reply. Every thing here was known but the name. This brings the case much nearer to the first point in *Patterson v. Gandasequi* than to the second.

Lord TENTERDEN, C. J.—I am of opinion that the direction given in this case was right, and that the verdict following that direction was right. Where a person sells goods, supposing that he is dealing with a principal, and afterwards discovers that the person with whom he has been dealing is an agent for a third person, as soon as he finds out that fact, he may resort to the principal for payment, though he originally meant to give credit to the agent. The situation of the principal must not, however, be altered by this election. On the other hand, if at the time of the sale, the seller not only knows that the party with whom he is dealing is dealing as an agent, but also knows who the principal really is, then, according to the case of *Patterson v. Gandasequi*, he cannot upon the failure of the agent turn round and sue the principal. The present is a middle case. The defendants in error were informed that *M'Keene* was buying for another, but they were not informed who was his principal. They had not the means of making an election. It is true they might have known by making previous inquiry, but at the moment of the contract they had not the power of electing. The case, therefore, falls within the first division, and stands as it would have done if *M'Keene* had not been known to be an agent. There may be another exception where the principal is a foreigner. It may be an understood thing that the credit is given to the agent in Great Britain. Here the question might have been raised, whether it was not understood at Liverpool, and whether from that circumstance it must not be presumed, that the sellers gave credit to *M'Keene*, and not to a person residing in another jurisdiction. That point, however, though raised by counsel now, was not insisted upon below. The point really made at the trial has nothing to do with the residence at Glasgow. It is said that it is sufficient that the seller

knew that they were dealing with an agent. The recorder thought otherwise, and told the jury that unless the seller knew who *M'Keene's* principal was, the defendant continued liable; and I think he did right in so leaving it to them.

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BAYLEY, J.—There may be a course of trade by which the seller will be confined to the agent with whom he contracts. That is usually the course where an agent buys for houses abroad. Evidence might have been given of a course of trade with respect to agents acting here for a house at Glasgow, but that point was not made in the Court below, and is not included in the bill of exceptions. The justice of the case appears also to be with the defendants in error; although an agent may contract so as to make himself personally liable, the principal may be liable also, and if the state of accounts between the parties has not been altered, justice requires that it should be so. Although the agent contracts so as to make himself liable, the principal is also liable unless something be done to exonerate him. Here it was known that there was a principal; but there is no case to show that that alone is sufficient to prevent the vendor from suing the principal, not having known who that principal was at the time of the contract. Here the vendor debits the agent and means to look to him. The neglecting to ask who the principal is, is at the vendor's peril, and he will have no claim if the principal shall have paid the agent, or if a variation has taken place in the state of their accounts so as to make it unjust for the vendor to resort to the principal; but where that does not appear, it is reasonable that the party who has had the goods should pay for them, and that the amount should be paid to the seller, and not to the insolvent agent, who has not paid for them himself.

LITLEDALF, J.—Where goods are sold to a party who turns out to be an agent, the vendor may afterwards resort

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to the principal. If the principal is known at the time, and the vendor elects to give credit to the agent, the principal is discharged, or if he elects to debit the principal the agent is discharged. The more reasonable course in general is, that the vendor should resort to the principal. Here the agent does not communicate enough to enable the seller to debit any particular person. It is said that the sellers might have inquired; but they were not bound to inquire. It might have been made a question whether the residence of the principal in Scotland made any difference, but that point not being in the bill of exceptions cannot form part of our consideration.

PARKE, J. having been engaged as counsel in the cause gave no opinion.

Judgment affirmed (a).

(a) And see *Graham v. Dyster*, 6 M. & S. 1; *Hornby v. Lacy*, ib. 166.

DOE, on the several demises of EDWARD WORGER and THOMAS HEATH, v. HADDON and another.

Where under a power lands are appointed to A. to the use of B. the legal estate remains in A.

**EJECTMENT** for a messuage and land at Westerham, in the county of Kent. At the trial at the Maidstone Spring Assizes, 1827, (a) a verdict was found for the plaintiff, with leave for the defendant to move to enter a nonsuit. A rule to that effect having been obtained, the Court directed the facts to be turned into a special case.

By indentures of lease and release and settlement, 27th and 28th June, 1791, the release being made between the Right Honourable *Edward Craggs*, Lord *Eliot*, Baron *Eliot*, of Port Eliot in the county of Cornwall, of the first part; the Honourable *Edward James Eliot*, eldest son and heir male of the body of the said *E. C.* Lord *Eliot*, of the second part; the Right Honourable *John* Earl of *Chatham*, and

(a) Counsel for the plaintiff, *Gurney* and *Bolland*; for the defendant, *Marryat* and *Chitty*.

the Right Honourable *William Pitt*, of the third part; and the Right Honourable *George Lord Bishop of Lincoln* (a), and the Most Reverend (a) *Joseph Turner*, D. D. of the fourth part; it is witnessed, that for the nominal considerations therein expressed, the said *E. C. Lord Eliot* and *E. J. Eliot*, by virtue of and in execution of a power therein recited or referred to, directed, limited and appointed (b), *inter alia*, all that messuage, &c., situate, lying, and being at Westerham in the county of Kent, and called Spout Farm, then or late in the occupation of &c. to hold unto the said *John Earl of Chatham* and *William Pitt*, their heirs and assigns, to the uses therein limited concerning the same, (that is to say) to the use of the said *George Lord Bishop of Lincoln* and *J. Turner*, their executors, &c. for the term of 1000 years from thenceforth next ensuing and fully to be complete and ended, upon the trusts therein declared concerning the same, with remainder to the use of the said *E. C. Lord Eliot*, and his assigns, for his life *sans waste*; with remainder to the use of the said *John Earl of Chatham* and *William Pitt*, and their heirs, during the life of the said *E. C. Lord Eliot*, upon the usual trusts for preserving contingent remainders; with remainder to the use of the said *E. J. Eliot* and his assigns for his life *sans waste*; with remainder to the use of the said *John Earl of Chatham* and *William Pitt*, and their heirs, during the natural lives of the said *E. C. Lord Eliot* and *E. J. Eliot*, and the life of the survivor of them, upon trust to preserve contingent remainders; with remainder to the use of the first and other sons of the body of the said *E. J. Eliot* successively in tail male; with remainder to the use of *John Eliot*, second son of the said *E. C. Lord Eliot*, and his assigns, for his life *sans waste*; with remainder to the use of the said *John Earl of Chatham* and *William Pitt*, and their heirs, during the life of the said *John Eliot*, upon trust to preserve the contingent remainders; with remainder to the use of the first and other sons of the body of the said *John Eliot* successively in tail

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(a) *Sic.*

(b) *Vide infra*, 122, (a).

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male; with divers remainders over. Then follows a declaration that the said manors by the said indenture were limited in trust as therein mentioned. And in the said indenture of release and settlement of the 28th day of June, 1791, is then introduced a power or provision in the words or to the effect following. "Provided also and it is hereby further declared and agreed, that notwithstanding any of the uses, estates, limitations, trusts, powers, provisoes, and agreements hereinbefore mentioned, declared, and contained, of, and concerning all or any of the manors, and in and by these presents granted, released, limited, and appointed, or intended so to be, it shall and may be lawful to and for the said *John Earl of Chatham* and *William Pitt*, and the survivor of them, and the heirs and assigns of such survivor, as to the several manors, messuages, lands and hereditaments, in and by these presents limited to them as aforesaid. And as to all other the said manors, boroughs, capital messuages and other messuages, farms, lands, &c., to and for the said *G. Lord Bishop of Lincoln* and *J. Turner*, and the survivor of them, and the heirs and assigns of such survivor, with the consent and approbation of the said *E. C. Lord Eliot*, and of the next succeeding tenant for life, or if the said *E. C. Lord Eliot* shall happen to be then dead, then with the consent and approbation of the several tenants for life then in being, testified by any deed or writing signed, sealed and delivered by him or them in the presence of and attested by two or more credible witnesses, to sell, dispose of and absolutely convey, or convey in exchange for or in lieu of other freehold, copyhold and leasehold lands and hereditaments to be situate, &c. the said manors, messuages, farms, lands, &c., hereby granted and released, limited or appointed, *or intended so to be (u)*, or any part or parcel

(u) These words, though commonly used by verbose conveyancers, appear to be in all cases wholly useless, since a reference to a provision in the deed concerning "hereditaments thereby granted, &c.," can only be under-

stood as a reference to a provision concerning hereditaments thereby *expressed or intended* to be granted, &c. The caution in describing a deed as "bearing date on *or about* such a day" appears to be almost equally unnecessary.

thereof respectively, save and except the burgage messuages or tenements in the borough of St. Germain's, and the fee simple and inheritance thereof, to any person or persons, his, her and their heirs, either together or in parcels, for such price or prices in money, or such other equivalent in manors, messuages, lands or hereditaments, as to them, the said Earl of *Chatham* and *William Pitt*, or the survivor of them, or the heirs or assigns of such survivor, as to the manors, hereditaments and premises as hereinbefore granted, released, directed, limited and appointed to them as aforesaid, and as to them the said *G. Lord Bishop of Lincoln* and *J. Turner*, or the survivor of them, or his heirs or assigns, as to all other the manors, hereditaments and premises in and by these presents granted or released, shall or may seem reasonable or proper. And for the purpose of effecting such sale or sales, or exchange or exchanges, it shall and may be lawful to and for the said respective trustees of the said respective manors, hereditaments and premises, and the survivor of such respective trustees of the said respective manors, hereditaments, and premises, and the survivor of such respective trustees, and the heirs and assigns of such survivor, with such consent and approbation as aforesaid, and subject in manner hereinbefore mentioned, by any deed or deeds, writing or writings, to be by them the said respective trustees of the said respective manors, hereditaments and premises, or the survivor of such respective trustees, or the heirs or assigns of such survivor, sealed and delivered in the presence of and attested by two or more credible witnesses, to revoke annul and determine and make void all and every or any of the uses, estates, limitations, trusts, powers and provisoes, hereinbefore by these presents respectively limited, created, mentioned, declared, and contained, of and concerning the said hereditaments and premises hereby *granted, released* (a), limited or appointed, *or intended so to be* (b), and every or any part or parcel thereof, and to limit and appoint the same, or such part or parts thereof as shall be sold and exchanged,

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(a) *Vide infra*, 122, n.

(b) *Vide supra*, 120, n.

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and whereof the uses, estates, limitations, trusts, powers and provisoes, shall be so revoked, unto and to the use and behoof of the purchaser or purchasers thereof, or of the person or persons to whom the same shall be so sold or conveyed in exchange, and his or their heirs or assigns. And when any of the said premises shall be sold for a valuable consideration in money, and such proper receipt or receipts shall be so signed and given for such purchase money as aforesaid, and also when the said hereditaments &c., hereinbefore granted, released, limited or appointed, or any part or parts thereof, shall be sold and disposed of, or conveyed in exchange for or in lieu of other freehold, copyhold or leasehold lands and hereditaments in &c., and the fee simple and inheritance, or the estate and interest of or in such hereditaments respectively to be taken in exchange shall be well vested respectively in the trustees hereinbefore named of and concerning the premises which shall be sold or given in exchange, or the survivor of them, his heirs, executors, &c., according to the nature or tenure of such respective estates, then all and every the said manors, &c., hereinbefore mentioned, and hereby *granted, released, (a) limited or appointed or intended so to be, or such part or parts thereof as shall be sold or disposed of, or conveyed in exchange, shall from thenceforth remain and be for ever freed and absolutely discharged of and from all and every the uses, estates, trusts, declarations, powers, provisoes, conditions and agreements, in and by these presents limited, expressed, declared and contained, of and concerning the same respectively, and from thenceforth these presents, and the grant, release (a), limitation and appointment hereby made,*

(a) Unless these words are introduced here by mistake, it would seem that Lord *Eliot* and his son did not merely "direct, limit and appoint" the estates to Lord *Chatham* and Mr. *Pitt*, but also "bargained, sold and released" them, although these words are omitted in that part of the special case which

professes to state the operation of the settlement of 1791 (*supra*, 119(b)). And this is rendered highly probable by the circumstance of the conveyance of 1791 being by indentures of lease and release, and not by a single indenture of appointment. In *Wynne v. Griffith*, 8 D. & R. 470; 5 B. & C. 923;

shall be and enure, as to such of the premises as shall be so respectively sold and disposed of or conveyed in exchange, to the only use and behoof of such purchaser or purchasers, or such other person or persons, to whom they shall be so respectively sold, disposed of, or conveyed in exchange, and of his or their heirs and assigns respectively for ever." (Power for the Earl of *Chatham* and *Mr. Pitt* to apply the money arising from the sale in discharge of any sums charged upon lands conveyed to them by virtue of the trusts of the term of 1000 years. Declaration with respect to the moneys arising from the sale of the lands. Such moneys to be laid out in the purchase of other real estates, to be held on the same uses, and to be invested in securities in the meanwhile. Power for the Bishop of *Lincoln* and *Dr. Turner* as to certain lands in St. Germain's.) Provided also, that it shall and may be lawful to and for the said Lord G. Bishop of *Lincoln* and *J. Turner*, and the survivor of them, and the heirs and assigns of such survivor, by and with such consent and approbation, and to be testified in manner aforesaid, to exchange any such burgage, messuage or mes-

3 Bingham. 179, it appears to have been held that where *A.* and *B.*, having a power of appointment over an estate of which *A.* is seised in fee, subject to the power, execute indentures of lease and release, by the latter of which it is witnessed that *A.* and *B.* do bargain, sell, release, direct, limit and appoint the estate to *C.*, (in his actual possession being &c.) habendum unto and to the use of *D.*, the words shall be read distributively, assigning those in italics to *A.*, and the others to *A.* and *B.*; and that the conveyance shall operate, as the bargain, sale, and release of *A.* to *C.* to the use of *D.*, and as the appointment of *A.* and *B.* immediately to the use of *D.* The effect of which is to vest the legal estate in *D.*, (here, in the Bishop of *Lincoln* and *Dr. Turner*.) The con-

struction would of course be the same if *A.*, instead of being seised in fee, had only a particular estate. It appears indeed to be immaterial whether *A.* has any estate at all; since the rule of construction must be the same where the intention of the parties using the words to be construed is the same. Now the intention of *A.*, in using words by which he is made to bargain, sell, and release to *C.* to the use of *D.*, must be the same, whether *A.* be seised of an estate in the land or not. The principal difficulty seems to be where, as is frequently the case, the words of appointment to *C.* to the use of *D.*, and those of conveyance to *C.* to the use of *D.* are found under distinct testatums in the same deed, and therefore would appear to lead to contradictory results.

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suages, tenement or tenements, in the said borough of St. Germans aforesaid, for any other burgage, messuage or messuages, tenement or tenements, in the same borough, and which burgage messuage, messuage or messuages, tenement or tenements to be taken in exchange, shall be thereupon immediately conveyed, settled and limited to such and the same uses, upon the same trusts and for the same intents and purposes as the burgage, messuage or messuages, tenement or tenements, so to be given in exchange, is or are by these presents limited or settled (a). By indentures of lease and release of 5th and 6th August, 1801, the release being made between the said *John Earl of Chatham* and *William Pitt*, of the first part; the said *E. C. Lord Eliot*, of the second part; the Honourable *John Eliot*, described as the second and then the eldest surviving son of the said *E. C. Lord Eliot*, of the third part; and *Edward Whittaker*, Esq. of the fourth part. After containing the following recital: And whereas by the said indenture it is recited that the said *E. Whittaker* contracted for the absolute purchase of the messuage, tenement, lands, &c., called Spout Farm, situate at &c., for the sum of 5550*l.*, and by the said indenture it is also recited, that, since the said contract has been entered into, it had been discovered that 40 acres, part of the said farm, was of copyhold tenure, which having never been surrendered to or vested in the said *John Earl of Chatham* and *William Pitt* upon trust to sell cannot be

(a) It appears to be impossible to reconcile the clauses in the deed of 1791. On the one hand, unless, as the Court appear to have held, the whole fee vested in the Earl of Chatham and Mr. Pitt, the first limitation to them and their heirs must be rejected as wholly inoperative and nugatory. On the other hand, if the subsequent limitations be considered as creating equitable estates only, a construction is put upon the deed of 1791, which was

never contemplated by those who framed that instrument. This is evident from the attempt to vest a term of years in the Bishop of Lincoln and Dr. Turner, from the life estates being made without impeachment of waste, and from their being protected by the interposition of trustees to preserve contingent remainders. All which three circumstances are inconsistent with any intention to make these estates equitable.

included in the said contract therein mentioned ; and said copyhold part of the said farm was valued at the sum of 690*l.* and it was agreed that the same should be deducted from the said sum of 5550*l.* which reduced it to 4860*l.*, it is witnessed that by virtue of the power contained in the said indenture of the 28th day of June, 1791, and of all other powers whatsoever, and in consideration of the sum of 4860*l.* to the said Lord *Chatham* and *William Pitt* paid by the said *E. Whittaker*, and for the consideration therein expressed, the said *John Earl of Chatham* and *William Pitt*, by and with the consent and approbation of the said *E. C. Lord Eliot* and the said *John Eliot*, the next succeeding tenant for life, testified by their being parties to the now reciting indenture, and signing, sealing, and delivering the same, did bargain, sell, alien, release and confirm, and the said *E. C. Lord Eliot* and the said *John Eliot* did release, ratify and confirm unto the said *E. Whittaker*, his heirs and assigns, all that freehold messuage or tenement, together with the cottages, barns, stables, outhouses, buildings, court yards, backsides, gardens, and orchards, and all those several freehold closes, pieces or parcels of arable, meadow, pasture, woodland and hop ground thereunto belonging and therewith held, used, occupied and enjoyed, containing together by estimation, &c. situate, &c. and commonly called or known, &c. together with the said 40 acres of copyhold land, occupied and enjoyed therewith by the name of the Spout Farm, or by whatsoever other name, &c., in the tenure or occupation of, &c. deceased, or his assigns, under a lease thereof, granted for the term of twenty-one years from Michaelmas, 1782, and the reversion, &c., and also all the estate, &c., to hold the said messuage, &c. unto and to the use of the said *E. Whittaker*, his heirs and assigns for ever. And it is thereby further witnessed, that for the better and more effectually conveying and assuring the said hereditaments and premises thereby granted, released and confirmed, and by virtue of the aforesaid power, they the said *John Earl of Chatham* and *William Pitt* (by and with

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such consent and approbation of the said *E. C. Lord Eliot* and *John Eliot* as aforesaid, testified as aforesaid,) did thereby revoke, annul, determine, and make void all and every the uses, estates, limitations, trusts, powers and provisoes by the said indenture of the 27th and 28th days of June, 1791, limited, expressed and contained, of and concerning the same premises, as far as should or might be requisite for the effectual conveying and assuring thereof, according to the true intent and meaning of the now reciting indenture, did, (with such consent and approbation as aforesaid, testified as aforesaid) thereby limit and appoint all and singular the said hereditaments and premises thereby granted, released and confirmed, with the appurtenances, unto and to the use of the said *E. Whittaker*, his heirs and assigns, for ever. And it was by the now reciting indenture declared that the said premises should, from the date thereof, be for ever freed and discharged from all the uses, estates, limitations, powers and provisoes, by the said indentures of the 27th and 28th days of June, 1791, limited, declared and contained, as far as should be requisite, as aforesaid, and that the same and all fines and recoveries of the said premises should enure, as concerning the same, to the use of the said *E. Whittaker*, his heirs and assigns, for ever. The said indenture of the 6th August, 1801, is duly executed by the said Earl of *Chatham* and *William Pitt*, *E. C. Lord Eliot* and *John Eliot*, and attested in manner required by the power of sale and exchange contained in the said indenture of settlement of the 28th June, 1791. The case then set out indentures of lease and release, 27th and 28th January, 1802, whereby *Edward Whittaker* bargained, sold, and released unto *Edward Worger*, one of the lessors of the plaintiff, part of the premises sought to be recovered. The question for the opinion of the Court is, whether by the settlement of the 27th and 28th June, 1791, a term of 1000 years having been created and limited to the *Right Honourable George Lord Bishop of Lincoln*, and the *Most Reverend Joseph Turner*, D. D. they were material and necessary

parties to the deeds of 5th and 6th August, 1801, or whether there should not have been a count on their demise.

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*Cornish* for the plaintiff. The Bishop of *Lincoln* and *Dr. Turner* were not necessary parties to the deed of 1801, unless the estate for the term of 1000 years was in them. The conveyance of 1791 operated as an appointment to the Earl of *Chatham* and *William Pitt* in fee, and all the subsequent limitations became trust estates. Secondly. The uses created by the deed of 1791 were overreached and defeated by the revocation contained in the deed of 1801.

The counsel for the plaintiff had proceeded thus far in his argument, when it was perceived that the counsel for the defendants was not in Court. Upon which, the Court, being clearly of opinion with the plaintiff, gave him judgment *nisi*, which, on a subsequent day, after hearing a few observations from *Chitty* for the defendants, was made absolute.

Postea to the plaintiff.

CLEMENT v. CHIVES, in Error.

**ERROR** upon a judgment in the Court of Common Pleas. The second count stated that *Clement*, the defendant below, and plaintiff in error, published in a certain newspaper, a certain false, scandalous, and malicious and defamatory libel, of and concerning *Chives*, the plaintiff below, and defendant in error, containing therein, amongst other things, the false, scandalous, malicious, and defamatory matter following, of and concerning *Chives*; that is to say, "Greenwich Coachmen.—The insolence of the Greenwich coachmen and their cads becomes intolerable. Our notice has been called to *Thomas Chives*, (meaning, &c.) and his cad, who on Tuesday last insulted two females and

A written or printed publication, stating that *A.* has been guilty of gross misconduct in insulting persons in a barefaced manner, is libellous.

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some gentlemen, who were outside passengers, in the most barefaced manner." Plea, not guilty, to the whole declaration. General verdict of guilty, with 5*l.* damages; and a general judgment for the plaintiff below. The error assigned was, that the second count (*a*) did not disclose any sufficient cause of action.

*Plutt*, for the plaintiff in error. The libel not being laid to have been spoken with reference to the business of a coachman, nor appearing to have been attended with special damage, this count cannot be supported (*b*). The mis-

(*a*) The damages being general, the judgment below could not be supported unless *all* the counts were good. If, however, the Court of Error had come to the conclusion that this second count was bad, it would have become material to inquire if any of the other counts could be supported, in order to ascertain whether a *venire de novo* should be awarded. In *Fisher v. Clement*, (*ante*, i. 281; 7 B. & C. 459,) no such inquiry was made, the Court awarding a *venire de novo* upon the assumption that the counts not objected to in argument were good, though error was assigned upon those counts also. After the trial upon the *venire de novo*, the Court, however, was of opinion that these counts were also insufficient. This proceeding would have been rendered unnecessary, if the whole record had been inspected, and a general judgment of reversal pronounced in the first instance.

(*b*) In *civil* proceedings the question of libel or no libel appears to be in all cases matter of law for the decision of the Court, though it is enacted and declared by Mr. Fox's act, (32 *Geo.* 3, c. 60,) "that

upon the trial of an *indictment* or *information* for a libel, the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be required or directed by the Court to find the defendant guilty merely on the proof of the publication, and of the sense ascribed to the same in the indictment or information." In a *civil* action the plaintiff must shew the publication of the alleged libel, and must prove every material inducement and innuendo. After he has done this, it is conceived that unless some fact be adduced on the part of the defendant, tending to shew that the publication took place under circumstances which rendered it justifiable, the plaintiff is entitled to call upon the judge who presides to direct the jury authoritatively, and upon his own responsibility, whether the matter published is or is not a libel, without leaving it to the jury to form any opinion as to the tendency of the publication, or the intention of the publisher. Mr. Fox's act was founded upon a jealousy of the controul exercised by political judges over juries upon

conduct charged in the libel is, having *insulted* some person; which could not subject the party either to an action or to an indictment. [*Parke, J.* It charges the party with gross misconduct.] That charge is afterwards explained. <sup>20</sup>

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*Chitty* contra, referred to 3 Bac. Abr. Libel (A 2).

*Cur. adv. vult.*

BAYLEY, J. on a subsequent day delivered the judgment of the Court.—There is a marked distinction in the cases between verbal and written slander; the latter being usually attended with more premeditation, and being productive of more extensive and permanent injury than the former. In *King v. Lake (a)*, where the libel charged the plaintiff with having presented a petition “stuffed with illegal assertions, ineptitudes, and imperfections, clogged with gross ignorances, absurdities, and solecisms,” Lord Hale said, “that although such general words spoken *once*, without *writing* or publishing them, would not be actionable, yet here their being written and published, *which contains more*

the trial of offences commonly of a political character, and where no bill of exceptions would lie. But the application of the same rule to civil actions would not only introduce great uncertainty and confusion, but would deprive the subject of the chief protection which he at present enjoys. As the law now stands, if the judge at *nisi prius* holds that to be a libel which ought not to be so held, the defendant may secure the revision of that opinion by a higher tribunal, by tendering a bill of exceptions. So if that be held to be no libel which is conceived in point of law to amount to a libel, the plaintiff may save himself in like

manner. But the transferring of the question of libel or no libel from the Court to the jury, would, in the great majority of cases, have the effect of depriving the party of his constitutional remedy against that which he may consider an illegal decision, and of thereby giving in reality to the judge at *nisi prius* that power which it nominally vested in the jury. There do not appear to be many civil cases in the books in which this point has arisen, but the decisions in criminal cases before the statute seem, for the reason above stated, to apply with still greater force to civil proceedings.

(*a*) Hardres, 470.

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*malice*, they are actionable. In *Cropp v. Tilney (a)*, Lord Holt says, "Scandalous matter is not necessary to make a libel. It is enough if the defendant induces an *ill opinion* to be had of the plaintiff, or to make him *contemptible* and *ridiculous*." So Hawkins (*b*) defines a libel as "a malicious defamation expressed in printing or in writing, tending to blacken the memory of one who is dead, or the reputation of one who is alive, and to expose him to public *hatred*, *contempt*, or *ridicule*." This distinction is recognized in *Villers v. Monsley (c)*, *J'Anson v. Stuart (d)*, *Bell v. Stone (e)*, *Thorley v. Earl of Kerry (f)*, and in the late case of *Robertson v. M'Dougall (g)*. Here the libel is evidently calculated to bring the party into hatred and contempt.

Judgment affirmed.

- (a) 3 Salk. 325.  
 (b) 1 Hawk. P. C. c. 73, s. 1.  
 (c) 2 Wilson, 403.  
 (d) 1 T. R. 748.  
 (e) 1 Bos. & Pull. 331.  
 (f) 4 Taunt. 355.  
 (g) 4 Bingh. 670; 1 M. & P.

692. And see *Austin v. Culpeper*, 2 Show, 314, Skinn. 123; *Harman v. Delany*, 2 Stra. 898; *Bradley v. Methwyn*, Selw. N. P. 7th edit. 4100, n.; see also *Craft v. Boite*, 1 Wms. Saund. 248, n. (3).

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A termor, and also the party seised of the freehold subject to the term, may each recover damages to the extent of 200*l.* against the hundred for the injury resulting from a felonious burning in respect of their possessory and reversionary interests.

Where the reversioner sues, no servant of his having had the care of the premises, he is the proper person to give in an examination.

The examinant is not bound to state mere suspicions entertained by him as to the person who committed the offence, unless interrogated thereto by the magistrate.


The two days allowed by 9 *Geo. 1*, c. 22, for giving notice of the offence, were held to be exclusive of the day on which the fire happens.

trial before *Park*, J. at the Exeter spring assizes, 1827, (a) the plaintiff was nonsuited, subject to the opinion of this Court on the following case:—The plaintiff, before and at the time of the fires hereinafter mentioned, was and still is the proprietor of an estate called Canonteign, in the parish of Christow, and within the hundred of Wonford and county of Devon. Upon this estate stood a large house, formerly a mansion, but for many years past used as a farm-house; and this house, with an extensive range of barns and other outhouses belonging thereto, formed the barton (b) of Canonteign. The house, barns, and outhouses, except one stable, and another of the outhouses used as a dog-kennel, long before and at the time of the fire were in possession of *John Otton*, as tenant to the plaintiff, *Otton*, with his wife and family, residing in the house, and occupying the greater part of it. The other part of the house was occupied by *John Pennington*, the plaintiff's gamekeeper, who had lived there some years with his wife and family; *Pennington* also used the stable and dog-kennel, but had nothing to do with the other outhouses. The plaintiff himself resided at Stokelake, in the parish of Hennock, about four miles from Canonteign. On the morning of Saturday, July 9, 1825, the plaintiff, with some other gentlemen, his friends, went from Stokelake to Canonteign, barton, and taking *Pennington* with them were afterwards engaged in shooting rabbits in a part of the estate distant about a quarter of a mile from the barton, on the top of a high hill which commanded a view of the mansion and of all the outbuildings. While they were so engaged, at about two o'clock, *p.m.* fires were observed to break out in several parts of the premises; first in one of the barns, and then in another barn distant 300 yards from the first; afterwards in the dog-kennel, which was separated from the last-mentioned barn, and then in

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(a) Counsel for the plaintiff, *Coleridge* and *Prued*; for the defendant, *Wilde*, Serj., and *Carter*. (b) In the West of England this word signifies a farm homestead. *Vide Spelman, Barton & Bertona.*



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other of the outbuildings. The fires were immediately seen by the plaintiff, and he, as well as the persons with him, hastened to the spot, and were actively employed for a considerable time in endeavouring to extinguish the flames. The barns and outhouses were, however, burnt down. The plaintiff did not leave the place till about five o'clock, *p.m.* when it was supposed the fire had been subdued; but it broke out again in some of the ruins, and was burning a little between one and two o'clock in the following morning. On the day of the fire, and long before, *Otton*, his wife and family, and *Pennington* and his wife and family, were living upon the premises as aforesaid, and *Otton* had in his employ upon the premises several farming servants. *Otton* and several other persons known to the plaintiff were present in the barton, amongst the buildings, when the fire broke out, and when the plaintiff, his friends and *Pennington*, came there from the hill; and one of those persons, not a servant of *Otton's*, shortly afterwards discovered a ball of flax on fire under some straw in one of the outbuildings not then in flames, of which fact the plaintiff was then informed. The damage done to the barns and other outhouses in the possession of *Otton* greatly exceeded 200*l.*, and the fire was wilful and malicious. The plaintiff, on the evening of the same day, after his return home, mentioned to one of his friends the name of a person whom he suspected to be the author of the fire, and he retained the same suspicion long after the time of his examination hereinafter mentioned. On Monday, July 11, notice of the offence was given by the plaintiff to four inhabitants of the village of Christow, that being the nearest village to Canonteign, and in the same parish. On the 14th of the same month the plaintiff gave in his examination upon oath to a magistrate of the county, being the magistrate resident nearest to Canonteign, at the distance of about a mile and a half from that place. The examination stated, that "on Saturday last, the 9th day of this instant July, the barns and outhouses, part of the

barton of Canonteign, situate in the parish of Christow, in the hundred of Wonford and said county of Devon, and now in the possession of *John Otton*, and the property of him the said *Pownall Bastard Pellew*, were unlawfully, wilfully, maliciously, and feloniously set on fire; and this deponent further saith, that he *does not know* the person or persons who committed the said offence, or any of them.

*Pownall Bastard Pellew.*"

No other person was examined.

At the following Christmas *Otton* gave up his interest in the estate, and the plaintiff took possession of it. The repairs which have been done to the buildings injured or destroyed by the fires, have been done under the plaintiff's orders, and at his expense. The offenders have not been apprehended and convicted of the above-mentioned offence, nor any one of them (*a*). This action was commenced against the hundred within one year next after the offence had been committed.

*Praed*, for the plaintiff. Four objections were raised to the plaintiff's right to recover in this action. First, it was insisted that the plaintiff was incapable of suing, being merely a reversioner; but it is submitted that the plaintiff is within the words of the act, which are very large, and extend to every person sustaining damage (*b*). The plaintiff has sustained damage. The repairs were done at his expense, and he has paid the amount. This act is remedial, and is to receive a liberal construction; though it was contended at the trial, that as against the hundred the proceeding is to be considered as penal. The same act may be both penal and remedial. *Bones v. Booth* (*c*), *Ratcliffe*


(*a*) *Otton* was tried for arson on the prosecution of Captain *Pellew*, and was acquitted.

(*b*) By 9 *Geo.* 1, c. 22, s. 7, the remedy is given "to all and every the person and persons for the

damages they shall have sustained or suffered." The corresponding words in 7 & 8 *Geo.* 4, c. 31, s. 2, are, "to the person or persons damaged by the offence."

(*c*) 2 *W. Bla.* 1226.

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v. *Eden* (a), *Hyde v. Cogan* (b). In the Riot Act (c) the words are not so strong. [Lord *Tenterden*, C.J. You need not labour that point. It is penal as far as respects the offender, but remedial as against the hundred.] *Wilmot v. Horton* (d), Serjt. *Williams's* note to *Pomfret v. Ricroft* (e). The hundred cannot set up a contract between the plaintiff and his lessee. [Lord *Tenterden*, C.J. It does not appear that there was any contract. *Bayley*, J. I believe there are many cases in which the reversioner has sued.] The question came before the Court in *The Duke of Somerset v. Hundred of Mere* (f), but the decision proceeded upon a different point. In *Jefferson v. Jefferson* (g), it was said to be unreasonable to compel the party to wait until the reversionary interest became vested in possession. It would be equally unreasonable here. The plaintiff sustained immediate damage; for if he had wished to sell he could not have obtained so large a price. That is a sufficient cause of action. *Jesser v. Gifford* (h).

The defendant's second objection was, that the two days for giving the notice are both exclusive, and that the notice not having been given till the Monday was too late. This objection is founded upon a note of Mr. Serjt. *Williams* to *Pinkney v. Inhabitants de Roteland* (i), where, upon 27 *Eliz.* c. 13, s. 9, which requires the action against the hundred for a robbery under the statute of Hue and Cry, (13 *Edw.* 1, stat. 2, c. 1 & 2,) to be brought *within one year after such robbery*, it is stated to have been adjudged in *Norris v. Hundred of Gawtry* (k), that the day when the robbery was committed is to be included in the year; as if a robbery be committed on the 9th of October, the action must, at the latest, be brought on the 8th October following. But in *Nesham v. Armstrong* (l) notice was given on the 22d of

(a) Cowp. 485.

(g) 3 Levinz, 130.

(b) Dougl. 699.

(h) 4 Burr. 2141.

(c) 1 *Geo.* 1, stat. 2, c. 5.

(i) 2 Wms. Saund. 375, n. (3).

(d) Dougl. 702, n. (3).

(k) Hob. 139,

(e) 1 Wms. Saund. 321.

(l) Holt, N.P.C. 466, 1 B.&amp;A.

(f) 4 B. &amp; C. 167; 6 D. &amp; R. 247. 146.

March, where the fire was on the 20th. That case arose upon this very statute of 9 Geo. 1, and no objection was taken by *Richardson*, who argued for the defendant that the notice was not in time. He appears not to have thought the point arguable. The statute of uses (*a*) requires indentures of bargain and sale to be inrolled within six months; upon which Lord Coke says (*b*), "so as the date itself is taken exclusive." The 17 Geo. 3, c. 26, requiring memorials of annuities to be inrolled within 20 days (*c*), has been construed to exclude the day of execution. *Fallon, ex parte* (*d*). In *Lester v. Garland*, (*e*) the cases were reviewed by *Gant*, M. R., and the conclusion at which he arrived was this, that the day of the act done is to be excluded, unless the party to be affected by the computation be party or privy to such act. Here the effect of treating Saturday as one of the two days would be to throw back the act done to the Friday. *Duncan v. Carlton* (*f*). [*Bayley*, J. It has been held, upon the statute of *William* (*g*), that the five days are to be considered as five times 24 hours.]

The third objection was, that the plaintiff was not the proper person to give in an examination; and for this two cases are relied on, *Nesham v. Armstrong* (*h*), and *The Duke of Somerset v. Hundred of Mere* (*i*). In the former case the objection was, that the partner was not examined. [*Bayley*, J. There the examinant confined himself to saying that *he* did not know.] Lord *Ellenborough* says, "Looking at the object of the act of parliament, it is clear that the legislature intended that the hundred should have the knowledge of all the parties claiming the benefit of that act. It may be true, that as far as respects property, the possession of one joint tenant is the possession of all. But it does not thence follow that the knowledge of one is the

(*a*) 27 Hen. 8, c. 16.

(*b*) 2 Inst. 674.

(*c*) 17 Geo. 3, c. 26, s. 3; now 30 days by 53 Geo. 3, c. 141.

(*d*) 5 T. R. 283.

(*e*) 15 Ves. 241.

(*f*) 4 D. & R. 391, 2 B. & C.

798.

(*g*) 2 W. & M. sess. 1, c. 5.

(*h*) Holt N. P. C. 460, 1 B. & A.

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(*i*) 4 B. & C. 167; 6 D. & R. 247.

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knowledge of all; this act confers a benefit on certain conditions, one of which is, that the party claiming such benefit must make oath whether he or they have any knowledge of the persons that committed such act." In *The Duke of Somerset v. Mere* the premises were in the actual care of a servant; but the only person examined was the steward, who had not the care of the property, but lived at a distance. Here there was no servant in charge of out-houses and barns which were destroyed. The plaintiff could not compel the tenant to go before the magistrates, nor had the latter any power of sending for him. They were acting only ministerially. *Helier v. Hundred of Benhurst (a)*.

The fourth point taken is as to the matter of the examination; and it is objected that the plaintiff did not state that he entertained suspicion of the offender. It is necessary that the examinant should state whether he knows who the offender is. *Thurtell v. Hundred of Mutford (b)*. That is all that the act requires; and, as was said in *William King v. Inhabitants of Bishop's Sutton (c)*, it is dangerous to go out of the words of the act. In *Nesham v. Armstrong* the same objection might have been taken. Indeed scarcely any case can be supposed in which the examinant does not entertain some slight suspicion. But it is not usual to state these suspicions, and their disclosure might be attended with dangerous consequences. Besides, though it is stated that the plaintiff had suspicious before and after, it does not necessarily follow that he entertained those suspicions at the time of the examination.

*Follett contra*. Upon the first point the defendant does not contend that a reversioner has not such an interest as will in general entitle him to maintain an action, but he denies that he has such a right given him by this act; and he submits that the word "persons" is not to be applied to distinct interests, but must be confined to persons jointly in-

(a) Cro. Car. 211. (b) 3 East, 400. (c) 2 Stra. 1247.

terested. Only one offence has been committed. Suppose, under the Riot Act (a), which contains no limitation in point of time, a tenant were to bring his action and recover 200*l.* in respect of the possessory interest, there would be no mode of apportioning this 200*l.* between the tenant and the reversioner, and yet the hundred cannot be liable to two penalties in respect of one offence. The property must be set fire to out of malice to the plaintiff in the action, and the malice will be taken to be against the person in possession. *Curtis v. Hundred of Godley* (b). This is a penal statute. In *The Duke of Somerset v. Mire* the point was taken at the bar, and left undecided. One of the objects of the statute was to stimulate the party to proceed by indictment, which the reversioner cannot do. This appears by the first section.

Upon the second point it may be observed, that the cases cited by the plaintiff are not upon this act, but upon others which are differently worded. As the law was understood to be at the time of the passing of this act, notice should have been given in this case on the Sunday. *Norris v. Hundred of Gavtry* (c), *Bellasis v. Hester* (d), *The King v. Adderley* (e). So in 2 Wms. Saund. 379, (3), both days are considered inclusive. [*Parke, J.* referred to *Glassington v. Rawlins* (f).]

Upon the third point, it will not be denied that if the plaintiff was a proper person to bring the action, he was a proper person to be examined. But it is submitted that he was not the only person. If the reversioner's examination were sufficient, this provision of the statute would be rendered nugatory. [Lord Tenterden, C. J. Suppose the servant set fire to the house and was burnt.] The true construction of the clause seems to be "person injured," if he has the care of the property, or "servants" where they have the care of it. The reversioner could in the ordinary

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(a) 1 Geo. 1, stat. 2, s. 5.

(d) 1 Ld. Raym. 280.

(b) 3 B. &amp; C. 248; 5 D. &amp; R. 73.

(e) Dougl. 463.

(c) Hob. 139.

(f) 3 East, 407.

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course of things have no means of knowing who had set fire to the property. [*Bayley, J. The Duke of Somerset v. Mere* only shews that where you resort to the servant, that servant must appear to have the charge of the property.] That was the decision in the particular case, but the reasoning is of a more general character. [*Lord Tenterden, C.J.* If you are right upon this point, you exclude the reversioner altogether.] The plaintiff does not give the hundred that information which will enable them to prosecute within the six months. This is founded on the principle of the old law, that the hundred should not be liable where the means of convicting the offender were withheld. \*

Upon the fourth point, it is submitted that the object was to enable the hundred to find out the offender. The plaintiff was therefore bound to communicate his suspicions. He might safely swear that he did not *know* who the offender was, unless he actually saw the felonious act done. *W. King v. Hundred of Bishop's Sutton* merely shews, that saying "I suspect," without stating whether I know or not, is insufficient. It was there said, that the proper course would have been to say, "I suspect, but I do not know." If the plaintiff be in a condition to sue, it is admitted that he must be entitled to the whole 200*l.*

*Praed*, in reply. The statute 9 *Geo. 1, c. 22, s. 7*, provides that no person shall recover more than 200*l.*, but does not restrict the liability of the hundred to that sum. *Jackson v. Hundred of Calesworth (a)*. Here, however, it is too late for the tenant to bring an action. If the legislature had intended to narrow the time for giving notice in the way the defendant contends, it would have been easy to say, "on the same day or the next" [*Littledale, J.* While the fire continued the damage could not be ascertained; the examination, therefore, could not be completed. *Follett*, The order of the words shews that the barns were burnt before the parties left the spot.] The person who was in

(a) 1 T. R. 71.

possession at the time of the loss may not have been living on the premises, and may know nothing about the matter. The condition precedent imposed by the statute is, that the examinant shall state whether he knows who committed the offence or not. That condition being performed, the magistrates may, if they think proper, make further inquiries.

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*Cur. adv. vult.*

On a subsequent day Lord TENTERDEN, C. J. delivered the judgment of the Court.

The first objection taken to the plaintiff's right to recover in this action was, that he was not in possession, but merely a reversioner. The 7th section of 9 Geo. 1, c. 22, gives a remedy "to all and every the person and persons injured" (a). No distinction is made between a party in possession and a reversioner; and I see nothing to restrain each from recovering to the extent of 200*l*.

The second (b) objection was, that the plaintiff was not the proper person to be examined. By the 8th section no person or persons shall be enabled to recover any damages by virtue of this act, unless he or they, by themselves or their servants, within two days after such damage or injury done him or them by any such offender or offenders as aforesaid, shall give notice, &c. (c). If the plaintiff was not the proper person, it would follow that no person could be examined, for no servant of the plaintiff had the care of the


(a) See the corresponding provision in 7 & 8 Geo. 4, cap. 31, sect. 2, *ante*, 133, note (b).

(b) This objection was called the *third* by counsel during the argument.

(c) The words of 7 & 8 Geo. 4, c. 31, s. 3, are, "unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the

commission of the offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the name of the offender or offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and shall become bound by recognizance before him to prosecute such offenders when apprehended."



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premises. The statute is in the alternative, and we are of opinion that the plaintiff was the proper person to be examined; though where a servant has the care of the premises, and the owner knows nothing of the transaction, the servant ought to be examined.

The third (*a*) objection was, that the plaintiff did not disclose his *suspicion*. The examination states that the plaintiff did not know who the offender was, but it is contended that he ought to have communicated the suspicion which he appears to have entertained. There is nothing in the act which makes it necessary to state a bare suspicion. The magistrate may examine and sift the matter, but the examinant cannot be bound to state mere suspicions, without matter of fact to support them. Such a statement might do injury in more ways than one. It might affect the character of an innocent man, and it might enable a guilty party to escape.

The fourth (*b*) objection was, that the notice should have been given on the Sunday. It is quite impossible to reconcile the cases, or to deduce any clear principle from them. In *Lester v. Garland*, the Master of the Rolls thought that the Court should look to the circumstances of each particular case, and that one rule for ascertaining whether the day on which the act is done should be included or not, is to see whether the act is to be done by the party against whom the computation is made. We think that this rule may be applied to this statute. Here the notice is to be given by a party who may be wholly ignorant of the act with reference to which the computation is to be made. A contrary construction would very much narrow the remedy which it was the object of this statute to give to the party injured. If, instead of two days, the act had given only one day after such damage or injury done, it could hardly have been contended that the notice must have been given on the very day of the fire. Then if one day would not expire on the Saturday, could two days be said to expire on the Sunday?

Judgment for the plaintiff.

(*a*) Fourth, in the argument.

(*b*) Second, in the argument.

CLARKE v. PALMER.

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BY rule of Court, Hil. 2 & 3 Geo. 4, it is ordered that the plaintiff's attorney shall, upon every writ of *capias ad satisfaciendum*, indorse the place of abode and addition of the party against whom the writ is issued, or such other description of him as such attorney may be able to give. On the 14th of November the plaintiff's attorney delivered to the under-sheriff of Kent a *ca. sa.* against the defendant, returnable on the last general return of Michaelmas term, indorsed to levy 470*l.*, and desired to have a warrant, directed to *Morris*, a sheriff's officer residing at Greenwich. Nothing was indorsed on the writ except the sum 470*l.* to be levied, but the attorney stated verbally to the under-sheriff that the defendant was travelling about the county of Kent, and that he would endeavour to ascertain where he was, and inform *Morris* where he would be likely to find him. No further communication was, however, made either to the under-sheriff or to *Morris*. On the same day a bailable *latitat* against the defendant, at the suit of one *Bird*, was delivered to the under-sheriff, who granted a warrant thereon to *Hoskins*, a bailiff residing at Tonbridge Wells. On the 15th the defendant being arrested by *Hoskins*, paid the debt and costs in *Bird's* action, and was discharged. Early in this term the plaintiff ruled the sheriff to return the *ca. sa.*; whereupon the latter obtained a rule nisi for setting aside the *ca. sa.* for irregularity, and for discharging the rule to return the *ca. sa.*, with costs.

Where a *ca. sa.* not indorsed with the abode and addition, or other description of the parties against whom it issues, is received by the sheriff without objection, the Court will not set aside the writ unless this non-compliance with the rule H. 2 & 3 Geo. 4, place the sheriff in a position in which he ought not to stand, as where it subjects him to the risk of an action for an escape.

*Campbell* now shewed cause. The rule of Court contains no provision for making the *capias* a nullity, if the abode and addition of the party against whom the writ is issued be not indorsed on the writ. Nor does it appear that the defendant carried on any trade, or that he had any residence by which he could be described. But supposing

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the process to have been irregular, the sheriff of Kent was not in a situation to take the objection after granting a warrant as upon a valid writ.

*Gurney*, *contra*. Under the last clause of the rule of Court the plaintiff's attorney was bound to indorse the information which he verbally communicated.

LORD TENTERDEN, C. J.—I think that we ought to set aside this writ under the circumstances. It is true that the rule contains no clause of nullity, and I would by no means be understood to lay it down as a general rule, that in all cases where a *ca. sa.*, not indorsed according to the rule of Court, is received by the sheriff without objection, the Court will afterwards interfere to set aside the writ; but where the consequence of the non-compliance with the rule is to place the sheriff, if the writ stand, in a situation in which he ought not to be placed, I think we ought to set the writ aside. Here the plaintiff's attorney obtains a warrant directed to an officer named by himself, and he promises to give information to that officer. This he omits to do. He does not even state where the defendant resided when he brought the action against him. The defendant is afterwards arrested by another officer in a different part of the country. I do not say what the effect of that arrest would be if the present writ were not set aside, but the sheriff might be exposed to the risk of an action for an escape. I do not say that such an action would be absolutely maintainable. If, however, the sheriff be liable to the full extent of the debt for which the *ca. sa.* issues, there is no power to mitigate the sum to be recovered (*a*).

(*a*) In the common law action on the case for an escape upon mesne process, the jury give such damages as are equivalent to the diminution of the chance of obtaining payment occasioned by the escape. So if the plaintiff proceed at common law by action on the case for an escape of defendant in execution. But if he bring an action of *debt* under 1 Ric. 2, c. 12, against the officer from whose

BAYLEY, J.—If *Morris* himself had made the arrest, I think the sheriff might have been called upon (a).

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Rule absolute for setting aside the writ, without costs.

custody a prisoner in execution T. R. 505; *Beckford v. Welby*, 2. escapes, he is entitled to recover Esp. N. P. C. 591. And see *Hamilton v. Dalziel*, 2 W. Bla. 952; *Bonafous v. Walker*, 2 T. R. 126; 1 Wms. Saund. *De Moranda v. Dunkin*, 4 T. R. 38, g. 119; *Porter v. Viner*, 1 Chitt. Rep. 613, n.  
(a) *Taylor v. Richardson*, 8

### The KING v. The Trustees of the late DUKE OF BRIDGEWATER.

AN appeal was tried at the last Michaelmas Quarter Sessions for the county of Chester by the trustees of the late Duke of Bridgewater, against a rate made for the relief of the poor of the township of Preston on the Hill in the said county. The assessment upon the appellants was as follows :

| Occupiers' Names.                         | Description of Property.                                                                                                                                            | Rental.        | Sum Assessed. |
|-------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------|---------------|
| Trustees of the late Duke of Bridgewater. | Land taken for the Canal, Towing-paths, &c., with the profits arising therefrom, and Warehouses, Wharfs, Clay Shed, Stables, Offices, Guaging Docks, &c., adjacent. | £1,480 0s. 0d. | £185 0s. 0d.  |

The poor's rate in respect of the occupation of land, should be assessed with reference to the sum for which the land would let, not upon the net produce.

The possessors of canal property consisting of the canal, towing-path, and warehouses and offices adjacent, are to be assessed upon the same principle as the occupiers of land.

The sessions amended the rate by reducing the amount of property upon which such rate was made from the sum of 1480*l.* to the sum of 1164*l.* 15*s.* 2*d.* and confirmed the rate so amended subject to the opinion of the Court upon the following case :

The rate was duly made in point of form. The grounds of appeal were, that the principle upon which the appellants were rated was erroneous, inasmuch as it appeared that they

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were rated in proportion to the full amount of their gross receipts, as owners, as well as occupiers of the rated property in the respondents' township, whereas it appeared that the property of other inhabitants (who were occupiers of farms and premises, and who were named in this said rate, and upon whom notices containing the grounds of appeal had been served,) was rated only in proportion to the amount of the respective rents paid by them as occupiers of their said farms and premises, whereby the property of the appellants in the said township was greatly overrated in proportion to the other property therein. And other grounds of appeal were, that the profits arising from the occupation of farms and farming stocks, were either improperly omitted to be assessed according to the full value thereof, or were greatly underrated in proportion to the assessments made upon the tolls and income arising from the property of the appellants. And, lastly, that certain allowances and abatements (other than such allowances as were necessarily made to the appellants in the management of their property for collection, repairs, and every other attendant expense,) were made as far as regarded the above mentioned persons and profits, by assessing them on the rent only, which were not made in the case of the appellants. By several acts of parliament passed in the 32d & 33d years of the reign of Geo. 2, and the 3d & 6th years of the reign of Geo. 3, the late *Duke of Bridgewater* was empowered to make and extend certain canals communicating chiefly between Manchester, in the county of Lancaster, and the river Mersey at Runcorn Gap, in the county of Chester, and in consideration of the great charges and expenses to which the Duke was necessarily put, these acts authorized him to receive certain tolls upon the tonnage of all coals, goods, &c., which should pass along the said canals, but exempted from toll all stones and gravel for any highway in either of the above mentioned counties, and all manure carried by any person occupying land near the said canal. The appellants are the trustees of the late *Duke of Bridge-*

*water*, and do not any of them reside within the respondents' township, but are the owners and occupiers of the canal, upon a portion of which (to the extent of 1 mile and 3-16ths of a mile, passing in and through the said township,) part of the above rate, amounting to the sum of 644*l.* 15*s.* 2*d.* for lands taken for the canal, towing-paths, &c. with the profits arising therefrom, was made. With respect to the remaining sum of 510*l.* for warehouses, wharfs, clay shed, stables, offices, guaging docks, &c. adjacent, there is no question to come before the Court. The appellants derive no profit whatever from the said land in the respondents' township, except by the tonnage payable to them by virtue of the above mentioned Acts of parliament, but they are carriers on the canal, and receive freight for goods carried in their own vessels through the respondents' township, but the tonnage duty upon the goods so carried by the appellants, is included in the above sum of 644*l.* 15*s.* 2*d.* (a). Personal property, and profits in trade are not assessed to the relief of the poor in this township. The occupiers of land and houses in the said township are rated in the present assessment, as in all former assessments, at four-fifths of their respective rents, taking those rents as the criterion of the value of the land. The full amount of the tolls arising to the appellants from the canal and towing-paths in the said township, independently of their receipts as carriers for freight, but including the tolls upon the goods so carried by them, is 1272*l.* 4*s.* 0*d.* from which 466*l.* 5*s.* 0*d.* being deducted for repairs and collection, &c. the sum of 805*l.* 15*s.* 0*d.* is left, upon four-fifths of which, namely, the sum of 644*l.* 15*s.* 2*d.*, the appellants, as owners and occupiers of the part of the canal in question, were rated in respect of the tolls received or earned by them, no parts of their receipts as carriers (except the tonnage on such freights) being comprised in the rate. The question for the consideration of the Court is, whether the sum of 644*l.* 15*s.* 2*d.*, being four-fifths of the amount of the clear annual balance arising from all the tolls of the

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canal within the respondents' township, after deducting all expenses of collection, repairs, and every other attendant expense of that description, be or be not a proper criterion of value upon which such rate ought to have been made, with reference to the profit necessarily arising from farms and other ratable property in the said township, the occupiers of such farms and other property being assessed upon four-fifths of the amount of their respective rents alone. And if this Court shall be of the latter opinion, the order of sessions to be quashed.

*F. Pollock* and *Deacon*, in support of the order of sessions. With reference to other property in this township, this rate is properly imposed. *The Queen v. Barking* (a), *The King v. Brown* (b). If the trustees had been rated for their gross receipts, they would not have been rated upon the same principle as others, and the rate would have been clearly bad; but here a considerable deduction has been made for the outgoings, after which, the rate has been assessed at four-fifths of the remainder. If it should not appear whether the rent would be less, that might be a reason for sending the case back to the sessions, but the Court will not presume that there is any difference between the rent and the clear profits. [*Bayley, J.* Rent and profits are very different things.] Here the trustees are not rated on their profits. [*Bayley, J.* Suppose a farm being occupied by the owner, he makes from it 200*l.* a year, you say he should be rated on this sum, but he may perhaps, only make in rent 100*l.* per annum.] Property of this description is different from farming property. The question is, what will any one give for the tolls. [*Bayley, J.* And if the sessions will tell us what any one will give for these tolls, we shall know how to deal with the case. Has not this point been determined? Sir *James Scarlett*. In the case of *The King v. Atwood*, (c).] A farmer is not ratable for his stock. *The King v. Atwood*. For that reason it would be improper to rate him upon the

(a) 2 *Ld. Raym.* 1280. (b) 8 *East*, 528. (c) 6 *B. & C.* 277.

whole profits, part of which arises from the stock. But the general principle of rating, is the profit actually made. Nothing has been adduced to shew that the tolls would be worth less to let for than the sum at which the trustees are rated. The tonnage duties are, in effect, the rent.

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Sir J. Scarlett, Cottingham and Lloyd, contra, were stopped by the Court.

Bayley, J. The rate is to be made on the proprietors as occupiers of land, &c. A rule of rating is to be laid down applicable to every description of occupiers, otherwise, you do not rate all persons equally. If a party occupy as farmer he pays a rent for the privilege of occupying. This rent is not supposed to be the full amount of the profits of the farm, nor of the profits after deducting the expenses. The trustees here are owners and occupiers. The only rule for the sessions to adopt was, what the property would have been worth to let. This rule, which should have guided them, they have not followed. I lay out of the consideration, the fact that the proprietors were also carriers (a). We are not to look to the profits of trade, but to the occupation of land by the trustees. If rent be the criterion of value in other cases, it ought to be so in this. The rate had better be sent back to the sessions, to be amended according to the principle laid down in *The King v. Atwood* (b), namely, of making the assessment upon what the tolls would be worth to let. We recommend this course as most beneficial to the trustees, and we send this case back to the sessions with that view.

Case remanded to the Sessions (c).

(a) *Ante*, 145.  
 (b) 6 B. & C. 277.

(c) And see *The King v. Tomlinson*, *post*; 9 B. & C. 163.



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## The KING v. The JUSTICES of DEVON.

ON the 8th of April, 1828, an order of removal from Upottery, Devon, to Pitminster, Somerset, was served on the overseers of the latter parish. By the practice of the Court of Quarter Sessions, for Devon, an appeal may be entered and respited without notice, but it cannot be tried without giving notice, eight days clear before the sessions. No appeal was entered at the Easter Sessions, which were held at the Castle of Exeter, about 30 miles from Pitminster; but at the July Sessions the regular notice to try the appeal had been served. The Court of Quarter Sessions, being of opinion that it ought to have been entered at the Easter Sessions, refused to hear the appeal. In Michaelmas Term last, *Coleridge* upon the authority of the case of *The King v. The Justices of Southampton* (a), obtained a rule nisi for a mandamus to the justices to enter a continuance and hear the appeal.

Where an order of removal is served so late that an appeal cannot be tried at the next sessions, it is not necessary that an appeal should be entered at those sessions.

*Crowder* and *Praed* now shewed cause. An appeal against an order of removal must be made to the next possible sessions. *The King v. The Justices of the East Riding of Yorkshire* (b). If the party aggrieved by the order cannot give notice for the full number of days, he must enter and respite. *The King v. The Justices of Gloucestershire* (c); *The King v. The Justices of Herefordshire* (d); In *The King v. The Justices of the West Riding of York* (e), where six days only intervened between the service of the order and the sessions, *Le Blanc, J.*, said, "We do not think that the parish were entitled strictly to pass over the first sessions." [Lord *Tenterden*, C. J. What is the advantage of such a proceeding?] It affords the parties an opportunity of compromising in the interval between the two sessions. [Lord *Tenterden*, C. J. They are not bound

(a) 6 M. & S. 394. For the facts of this case *vide post*, 149.


(b) Dougl. 193.

(c) *Ibid.* 191.

(d) 3 T.R. 504.

(e) 4 M. & S. 327.

to give notice until just before the sessions at which they try.]

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*Coleridge* and *Escott*, in support of the rule. In *The King v. The Justices of Essex* (a), this Court granted the application which is now made, on the ground that it would be idle to enter an appeal where the order of removal had been served too late to entitle the parties to try their appeal at the next sessions. Lord *Ellenborough* says, "The stat. 13 & 14 Car. 2, certainly directs the appeal to be at the next quarter sessions, but that must mean at the next practicable sessions. The parish officers must have a reasonable time allowed them to make the necessary inquiries, that they may judge of the propriety of appealing or not. The notice here is served on the Saturday. I am of opinion that they are not bound to devote Sunday to such a purpose. They have then only one entire day, i. e. the Monday, to get the necessary information, and to consider whether they will appeal or not, and that, in my judgment, is not sufficient. It has been said, that although the appeal could not have been heard at those sessions, still it ought to have been entered and respited; but that would only be incurring a useless expense, without conferring any benefit on either party, and was therefore quite unnecessary." In *The King v. The Justices of the West Riding of Yorkshire*, the appellants not only passed over the first sessions, but merely entered and respited at the second sessions; and *Le Blanc*, J. said, that if they had done at the second as much as they ought to have done, the Court would have relieved them. In *The King v. The Justices of Southampton* (b), the order of removal was made on the 2d of January, but not served till the 7th, and the Epiphany Sessions were held on the 14th. No appeal was entered at those sessions, and being entered at the Easter Sessions, after eight days' notice, as required by the practice of the Court, as well as in Devonshire, it was dismissed by the Court, who

(a) 1 B. & A. 210.

(b) 6 M. & S. 394.

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conceived that the appeal ought to have been entered and respited at the former sessions. There the Court made the rule for the mandamus absolute.

*Cur. adv. vult.*

LORD TENTERDEN, C. J. after stating the facts of the case.—The appellant parish could not have tried their appeal at the Easter Sessions. It has, however, been contended that it should then have been entered and respited. To enter, for the mere purpose of adjourning, would merely occasion unnecessary expense. The only inconvenience which can result from our holding that it is not necessary to enter an appeal at the first sessions, where it cannot be tried at those sessions, is, that the removing parish may be kept in ignorance of the intention to appeal until eight days before the second sessions. But this inconvenience, if it shall be found to arise, may be met by the Court of Quarter Sessions requiring, that, under such circumstances, a longer notice shall be given.

Rule absolute (a).

(a) And see *The King v. The Justices of Wilts*, 2 Bott, 4th edit. 717, 5th edit. 725; *The King v. The Justices of Flintshire*, 7 T. R. 200; *The King v. The Justices of Dorset*, 15 East, 200; *The King v. The Justices of Kent*, (in *Lenham v. Pluckley*,) ante, iii. 410, 8 B. & C. 639; *The King v. The Justices of Kent*, (in the matter of *Ritchie*,) 9 B. & C. 283.

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## The KING v. The Inhabitants of DITCHEAT (a).

TWO justices, by their order, removed *Martha Jerrard*, the wife of *Thomas Jerrard* then in St. Thomas's Hospital, in the borough of Southwark, in the county of Surrey, and their children, from the parish of Ditchheat to the parish of Lyncombe-and-Widcombe, both in the county of Somerset. On appeal, the sessions quashed the order, subject to the opinion of this Court upon the following case.

The pauper's husband rented a tenement in Lyncombe-and-Widcombe by the year, viz. from Lady-day, 1825, to Lady-day, 1826, at the yearly rent of 15*l.*, with liberty to quit at any time on giving a quarter's notice. After the first month's occupation, the pauper's husband left the pauper living in the tenement, and went to London, and remained there about seven months, during which period she remained in the tenement, and until she quitted it as after mentioned; and she paid the year's rent, the receipts for which were given as if it had been received from her husband. A few days after the 25th of March, 1825, the pauper's husband let an apartment in such tenement to one *Gay*, at the yearly rent of 8*l.*, payable quarterly, with liberty to quit at any time on giving a quarter's notice; and the same was occupied by *Gay* from the time of his taking, until the 25th of March, 1826, and his rent paid to that time. The pauper's husband gave notice at Christmas, 1825, to quit at Lady-day, 1826. The landlord permitted the pauper to occupy part of the tenement until Midsummer, 1826, on paying him 38*s.* for the same; and the pauper quitted at Midsummer, 1826. The pauper's husband never paid any parochial rates, although rated.

*Moody*, in support of the order of sessions. The pauper's husband acquired no settlement in the appellant parish for two reasons; first, because *he* never resided forty

(a) This and the following cases were decided at the sittings after the term, held under His Majesty's

Under 6 Geo. 4, c. 57, a pauper renting a dwelling-house for a year, at the yearly rent of 10*l.*, and residing in it forty days, but underletting part of it, is the "occupier," and thereby acquires a settlement: per *Littledale* and *Purke, Js.*; dissentiente *Bayley, J.*

warrant, by virtue of 3 Geo. 4, c. 102, as on former occasions.

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days in that parish; and, secondly, because he had not the exclusive occupation of the tenement. First, the husband never resided forty days upon the tenement. The case does not find that he did so, and the fact cannot be presumed. His wife and family did reside for a sufficient period, but that will not serve for the purpose of his acquiring a settlement; *Rex v. South Lynn (a)*, *Rex v. St. George, Southwark (b)*; if it would, the husband and wife might each acquire a settlement in distinct parishes at the same time. Besides the period of the occupation is important: it was from Lady-day, 1825, to Lady-day, 1826. It commenced while the 59 Geo. 3, c. 50, was in force; but that statute was repealed by the 6 Geo. 4, c. 57, which came into operation on the 22d of June, 1825, on which day the settlement of the pauper was not completed. In order to confer a settlement, the whole period of occupation must be under one statute or the other. The words of the latter statute are wholly prospective; therefore, the period commenced under the repealed statute cannot be

(a) 5 T. R. 664, where it was held, that a residence of thirty-three days by a widow on a tenement of 10*l.* a year, could not be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to give her a settlement.

(b) 7 T. R. 406. There the pauper took a tenement of 10*l.* a year in one parish, and after living in it with his family five days, was arrested and sent to prison in another parish. His wife and children continued in the tenement seven weeks longer: it was held, that no settlement was gained. In *Rex v. Crayford*, 9 D. & R. 80, 6 B. & C. 68, a man hired a house at 12*l.* a year for a whole year. He occupied the house, with his wife and family, till within three days of the expiration of the year, when

he died. He had previously paid the rent for three quarters of the year. His corpse remained in the house until the year expired, as did his widow and children, and his widow paid the fourth quarter's rent: it was held, that he gained no settlement under the 59 Geo. 3, c. 50, which could be communicated to his wife and children. And in *Rex v. Carshalton*, 9 D. & R. 132, 6 B. & C. 93, where a person, after the passing of the 59 Geo. 3, c. 56, hired a tenement of the annual value of 10*l.*, and occupied it for more than a year, but died before a whole year's rent was paid: it was held, that he gained no settlement, though after his death, and after the passing of the 6 Geo. 4, c. 57, the rent was paid out of money produced by the sale of his goods.

added to the period of occupation under the latter. That was the construction put upon the first statute, and the same ought to be applied to the latter; *Rex v. St. Mary-le-bone (a)*. If a different mode of calculation had been contemplated, the words would not have been all future and prospective. But even if the two periods can be connected, still all the conditions required by the 6 Geo. 4, c. 57, which passed on the 22d of June, 1825, must be shewn to have existed from that time. Now that is not so in this case, because the house was not occupied by the person hiring the same. Secondly, the pauper had not the exclusive occupation of the house, which is necessary under both the acts of parliament. The 59 Geo. 3, c. 50, was repealed by the 6 Geo. 4, c. 57, and it is a principle of construction that the same rules shall be applied to statutes made in *pari materia*, *Rex v. North Collingham (b)*. The 59 Geo. 3, c. 50, required that the house should be held, and the land occupied by the person hiring the same, for the term of one whole year at least. The 6 Geo. 4, c. 57, abolishes that distinction, and requires that "the house or building, or land, shall be occupied under such yearly hiring, and the rent for the same actually paid, for the term of one whole year at the least." Now the word *occupied* in the latter statute must receive the same construction as that which was given to it by the decisions on the former statute; and it has been held in several cases that the word *occupied* in the 59 Geo. 3, c. 50, was not satisfied, unless the party had the

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(a) 4 B. & A. 681. There a pauper hired a tenement of more than 10*l.* a year, and resided in it more than forty days altogether, but only thirty-eight days before the passing of the 59 Geo. 3, c. 50. It was held, that this conferred no settlement, the forty days not having been completed before the statute was passed. So with respect to the payment of rates, it has been held, that a residence of forty

days, previous to the passing of the 6 Geo. 4, c. 57, upon a tenement worth more than 10*l.* a year, by a party charged to, and having paid parochial rates, will not confer a settlement, unless all the forty days be subsequent to such payment. *Rex v. Ringstead*, 1 M. & R. 448; 7 B. & C. 607.

(b) 2 D. & R. 743; 1 B. & C. 578.

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*exclusive occupation of the land.* If the tenement was a house, and part of it was let out in lodgings, a settlement might be gained by reason of the word *held*; *Rex v. North Collingham* (a). In that case *Abbott*, C.J. said, "The word *held*, used in the statute, is applied to the dwelling-house, and if that be construed fairly, it seems to me, from the finding of this case, that the pauper's husband (who let off part of the house to a lodger) *held* the whole of this tenement. The difference of expression *held*, as applied to the house, may have been intended by the legislature to meet the case of lodgers, properly so called, and to prevent the question arising, whether a person could be said to occupy a whole house, provided he let the whole or part of it in lodgings" (b). *Rex v. Great Bolton* (c) is to the same effect, where Lord *Tenterden* said, "The safest course, in the construction of this or of any other statute, is to give effect to the different words contained in it, otherwise we must suppose different words to be used in the same sense. In the case of a house, it is therefore sufficient if it is held, in the case of land it must be occupied" (d). But if the tenement consisted of land, no joint occupation would suffice. *Rex v. Tonbridge* (e). In that case *Bayley*, J. said, "By the 59 *Geo.* 3, c. 50, it was required, in case of a house or building, that it should be *held* for a year by the person hiring it, in the case of land, that he should *occupy*. In the case of houses and buildings, therefore, so as the term subsisted, it was, in this respect, before the statute of 6 *Geo.* 4, c. 57, sufficient; so that under-letting a part of a house or building would not have prevented a settlement; and that point was accordingly so decided in *Rex v. North Collingham*. But in the case of lands, the person hiring was to *occupy* for the year. Did the pauper, then, occupy the garden for the whole year? It is stated in the case, that though the pauper took the garden, it was agreed between

(a) 2 D. &amp; R. 743; 1 B. &amp; C. 578.

(d) 2 M. &amp; R. 230.

(b) 2 D. &amp; R. 748.

(e) 9 D. &amp; R. 128; 6 B. &amp; C.

(c) 2 M. &amp; R. 227; 8 B. &amp; C. 771. 88.

him and *Maynard*, that they should share the expense and profit. It is also stated, that *Maynard* paid the pauper half the rent, and that the garden was thus occupied. It is not in terms stated that there was a joint occupation; but as *Maynard* was entitled to participate in the occupation, we think it must be taken that he did, and if so, the pauper cannot be considered as occupying more than a moiety of the garden. Unless the garden was *separately occupied* by the pauper the whole year, no settlement was gained" (a). His lordship had previously observed, that the distinction made in the 59 *Geo.* 3, c. 50, between houses and buildings on the one hand, and land on the other, was removed by the 6 *Geo.* 4, c. 57; by which he must have meant, that the latter statute, retaining the word *occupied* only, required a separate and exclusive occupation of the tenement in all cases, whether of house or land. [*Parke, J.* There is this distinction between the two acts of parliament—the former required the occupation of the tenement to be *by the person hiring the same*; in the 6 *Geo.* 4, c. 57, those words are omitted.] That is so, undoubtedly; but the latter act must be construed as if it contained those words. The legislature must have intended those words to be supplied, for without them, the conditions requisite for a settlement might be performed by other persons than the party acquiring the settlement; and this absurdity would follow, that a man might hire premises for a year, and the very next day assign them, and himself be absent and altogether unconnected with them for the rest of the year, and yet acquire a settlement. The words "occupied under such yearly hiring," in the 6 *Geo.* 4, c. 57, are equivalent to the words "occupied by the person hiring the same," and evidently imply, that the occupation is to be by the person by whom the yearly hiring is made. Here, the occupation was not exclusively by the pauper, the person who hired the tenement, consequently he acquired no settlement which could be imparted to his wife and children.

(a) 9 D. &amp; R. 131.



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*Rogers*, (*Jeremy* was with him,) *contra*. The Court cannot speculate upon what was the intention of the legislature, but must collect their intention from the words which they have used in the act of parliament; *Rex v. Tonbridge* (a), *Rex v. Sturton by Stow* (b). But before the words of the present statute are looked at, it is important to consider what was the state of the law before that statute passed, and what alteration has been introduced by that statute, particularly as regards the occupation of a tenement. Under the 13 & 14 *Car. 2*, the period for which the tenement was hired, for which it was occupied (after forty days), or by whom it was actually occupied, was immaterial. Under the 59 *Geo. 3*, c. 50, it was necessary that the tenement should be hired for a year, and, if it consisted of a house, that it should be *held*, or, if of land, that it should be *occupied*, for a year, *by the person hiring the same*. The concluding words override the whole sentence, and apply to every separate branch of it; and yet the house need not have been occupied under the original hiring, for the occupation of the same tenement under different hirings might be connected, *Rex v. Sturton by Stow*; or different tenements might be hired at different times, *Rex v. North Coltingham* (c). The 6 *Geo. 4*, c. 57, requires the occupation to be under the yearly hiring, but it does not in terms require it to be by the person hiring the tenement; those words are omitted, and must be taken to have been omitted purposely; the one restriction is substituted for the other. It is the same with respect to the payment of the rent. By the 59 *Geo. 3*, c. 50, the rent was required to be paid by the person hiring the tenement; in the 6 *Geo. 4*, c. 57, the latter words are omitted, and it has been decided that under that act the whole rent need not be paid by the person hiring the tenement, but that it is enough if it be "actually paid," in the very words of the statute; *Rex v. Kibworth*

(a) 2 M. & R. 227; 8 B. & C.

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(c) 2 D. & R. 743; 1 B. & C.

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(b) 6 D. & R. 110; 4 B. & C. 87.

*Harcourt* (a). [Bayley, J. The expression "under such yearly hiring" may not have reference to the person paying the rent, and yet may have reference to the person occupying; how can a sub-tenant be said to occupy under a yearly hiring made by another person? He occupies under that *and something more*, namely, the contract between himself and the original hirer. If occupation for a year is not required of the person hiring for a year, it is difficult to imagine why it is required at all, as a condition of obtaining a settlement.] The 6 Geo. 4, c. 57, must now be regarded as if the 59 Geo. 3, c. 50, had never existed, *The Bishop's case* (b), *Tattle v. Grimwood* (c). Supposing it never to have existed, the 6 Geo. 4, c. 57, only requires that the pauper shall rent for a year, and that the tenement shall be occupied under the yearly hiring, both which requisites have been complied with in the present case; and it is immaterial who the occupier is, provided the relation of landlord and tenant, as originally created, enures for the whole year. But, conceding that the statute requires that the tenement shall be occupied the whole year by the person hiring the same, there has still been a sufficient occupation in this case, because the occupation of an under-tenant must in general be considered, with respect to the lessor, as the possession of his lessee; *Rex v. Aberystwith* (d). *Gay* was only an inmate, and an inmate who goes in by the same door is in the nature of a lodger, and if his room is

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(a) 1 M. & R. 691; 7 B. & C. 790.

(b) 12 Co. Rep. 7.

(c) 3 Bingh. 496.

(d) 10 East, 354, where it was held that one who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, (which for that purpose was parted off with laths from the rest,) and left the key of the house door with a friend, and

had the garden cultivated for his own benefit as usual, was liable to be rated to the relief of the poor, as occupier of the whole house. And see *Rex v. St. Mary the Less in Durham*, 4 T. R. 477, where it was held that if the owner of a house occupy part of it, he is liable to be rated to the relief of the poor for the whole, unless there be a distinct occupation of the rest by some other person.

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robbed it is burglary; yet the indictment must lay it to be the dwelling-house of him who let it, and not of the inmate (a).

BAYLEY, J.—The statute 59 Geo. 3, c. 50, is repealed by the statute 6 Geo. 4, c. 57, therefore the question in this case is, whether a settlement was or was not acquired under the last-mentioned statute. By the 59 Geo. 3, c. 50, a settlement could not be acquired in the case of a house or building unless such house or building were held, or in the case of land unless such land were occupied, and the rent for the same actually paid, for the term of one whole year at the least, *by the person hiring the same*. That statute, therefore, contained an express enactment that the house should be *held*, and the land *occupied*, and the rent paid, *by the person hiring the same*. The words of the 6 Geo. 4, c. 57, are different. That statute is wholly silent as to the person hiring being required either to occupy, or pay the rent, and it has been decided in *Rex v. Kibworth Harcourt* (b), that according to the true construction of that statute, the rent need not be paid by the party hiring. The words “by the person hiring the same” must, therefore, be considered as erased from the statute 6 Geo. 4, c. 57, and the law to be altered, so far as it required the rent to be paid by the person hiring the premises; it is now sufficient if the rent be paid, whether by the person hiring the premises, or by any other person. The words of the statute 6 Geo. 4, c. 57, are, that the house or building, or land, shall be *occupied*

(a) “A room or lodging, in any private house, is the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different doors. But, if the owner himself lies in the house, and hath but one outward door by which he and his lodgers enter, such lodgers seem only to be in-

mates, and all their apartments to be parcel of the one dwelling-house of the owner. Kel. 84; 1 Hale, P. C. 556.” 4 Bla. Comm. 225; 18th ed. And see *ibid.* 226, n. (9), where the cases are collected.

(b) 1 M. & R. 691; 7 B. & C. 790; confirmed by the whole Court in *Rex v. Great Bolton*, 2 M. & R. 227; 8 B. & C. 771.

*under such yearly hiring*, and the rent for the same, to the amount of 10*l.*, actually paid, for the term of one whole year at the least. The language here is varied, for the statute says, not that the house or land shall be occupied *by the person hiring the same*, but only that it shall be occupied *under such yearly hiring*. The question then is, what is the true meaning of occupation *under such yearly hiring*. It is somewhat difficult to decide with certainty upon the real meaning of the legislature, where it is not, as in this instance, expressed in very intelligible language, but I incline to think the true construction of these words is, that the premises shall be occupied by the person to whom that hiring gives the right of occupation, and that occupation by any other person to whom that right is given, either by assigning or under-letting, is not an occupation under the yearly hiring, within the meaning of the statute. That is the present impression on my mind; if between this time and to-morrow morning I should change my opinion, I will communicate it to the Court<sup>(a)</sup>. My learned brothers are of opinion that the words “under such yearly hiring” do not make an occupation by the person hiring requisite, but that it is sufficient if either he himself, or any other person under him, occupies. As at present advised, I think that a person occupying as an under-tenant, though he may be said in some sense to occupy under the yearly hiring, cannot be said to occupy under the yearly hiring within the meaning of this clause of the act of parliament, because he has no connection with the person who is landlord with respect to that yearly hiring, and because though he does occupy in part under that yearly hiring, he does not in toto; he occupies under that *and something more*. With respect to the other question, namely, whether the holding previous to the 22d of June, when the 6 Geo. 4, c. 57, came into operation,

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(a) His Lordship did not make any such communication at the period mentioned; but a contrary opinion was afterwards expressed by Lord *Tenterden*, in the name of the whole Court, upon the same point; *Rex v. Great Bentley*, Hilary Term, 1830.

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and the holding subsequent to that period can be connected, I am of opinion that they may, provided the occupation previous to the 22d of June be such as satisfies the requisites of the 6 *Geo.* 4, c. 57; and, therefore, that if a party, before that statute came into operation, was in possession of a yearly tenement, and held it under such circumstances as that statute says shall be requisite in order to confer a settlement, a settlement will be conferred. There are no words in the 6 *Geo.* 4, c. 57, which import that the hiring shall be subsequent to the period when that statute came into operation. With respect to the residence of forty days, I think the case must go back to the Court of Quarter Sessions, in order that it may be stated more distinctly what the nature of the residence was, or whether the whole forty days' residence required was actually by the husband himself. The cause of the husband's absence, whether it was voluntary or by compulsion, or whether it arose from other circumstances, may perhaps become material.

LITLEDALE, J.—The principal question in issue in this case seems to me to depend upon the construction to be given to the word "occupied" in the statute of 6 *Geo.* 4, c. 57. There is a material difference between a holding and an occupation. A person may hold, although he do not occupy. A tenant of a freehold is a person holding of another, but he does not necessarily occupy. In order to occupy, a person must be personally resident either by himself or his family. In this case I think the husband was the occupier of the house during the whole period. It is not distinctly stated under what circumstances the apartment was let or occupied; but in an indictment for house-breaking it might clearly be described as the dwelling-house of the pauper's husband; and in an action for use and occupation he might properly be described, not only as the holder, but as the occupier of the house. The statute 11 *Geo.* 2, c. 19, s. 14, which gives the action for use and occupation where the agreement is not by deed, takes

a distinction between the words "held" and "occupied." It enacts, "that it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c., *held or occupied* by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed." The statute 43 *Eliz. c. 2, s. 1*, imposes the rate for the relief of the poor upon the "occupier;" and that rate in this case must clearly have been assessed upon the pauper's husband for the whole house, although he underlet a part (*a*), for, as it is laid down by *Mr. Nolan (b)*, "no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier." Therefore, as in an indictment for housebreaking committed in the apartment let to *Gay* the house might be described as the dwelling-house of the pauper's husband; as in an action for use and occupation he might be described as the occupier of the house; and as in a poor rate he might be assessed as the occupier of the whole house; it seems to me that he must be considered, in point of law, as having occupied and resided in the house. A man need not actually sleep or take his meals in a house, nor need his family actually inhabit the whole house, in order to make him the occupier; if he holds the whole house, and occupies part of it by himself or his family, the law considers him, for this purpose, the occupier. For these reasons I am of opinion that the pauper's husband may be considered as having occupied the house, within the meaning of the 6 *Geo. 4, c. 57*. If he had underlet the whole house, and occupied no part of it, the effect might, perhaps, have been different, because the word "occupation," applied to a house, undoubtedly implies personal residence; but if the lessee of a house dwells in any part of

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(*a*) See *Rex v. Aberystwith*, and *Rex v. St. Mary the Less in Durham*, ante, 157.

(*b*) 1 *Nolan's P. L.* 152; 3d ed.

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it, although he underlets the rest, he is considered in point of law, the occupier of the whole. If this is the right construction of the word "occupied" as used in this statute, which I think it is, it follows that the pauper's husband occupied the house, and then the only remaining question is, whether there was forty days' residence by the pauper's husband. Upon that point there is some doubt, and it is an essential point, for the legislature did not intend by the 6 Geo. 4, c. 57, to alter the law in that respect. I agree with my brother *Bayley* that the case ought to be sent back to the Sessions to have this doubt cleared up, and the fact distinctly ascertained.

PARKE, J.—I have entertained considerable doubt in this case, but upon the whole I incline to think that there was a sufficient occupation, and that a settlement was acquired in the parish of Lyncombe and Widcombe. The question turns entirely upon the construction of the 6 Geo. 4, c. 57. My judgment may have the effect of defeating the intention of the framers of that statute. But it is a safe rule of construction not to speculate upon the probable intention, but to adhere to the words of an act of parliament in their grammatical and natural sense, unless it appears certainly and clearly from the context that they were intended to be used in some other sense. There is a material difference between the two statutes 6 Geo. 4, c. 57, and 59 Geo. 3, c. 50. The last-mentioned statute expressly requires the house to be held, and the land to be occupied, and the rent to be paid, by the person hiring the same. The statute 6 Geo. 4, c. 57, omits the words "by the person hiring the same." It does not require that the rent shall be paid, or the house occupied, by the person hiring the same, but only that the house shall be occupied *under the yearly hiring*. Now those words may be satisfied by the continuance of the term, and by the occupation of a sub-tenant or assignee during the continuance of that term. It is not necessary for the purposes of this case to decide

whether occupation by an assignee would be sufficient or not. There has been an occupation here by a person whose character is left doubtful, for it is not stated in the case whether he was a sub-tenant having an entire occupation of one part of the house, or whether he was a mere lodger. But it seems to me that there was an occupation by the pauper's husband under the yearly hiring, provided the premises continued in the occupation of any person entitled under the tenancy created by the yearly hiring. I find nothing in the context of this clause to shew that the words which are there used, taken in their plain natural sense, do not express the intention of those who used them; and I must, therefore, suppose that the legislature, when they repealed the 59 *Geo.* 3, c. 50, which expressly required an occupation by the person hiring, had reasons for omitting, and intended to omit those words in the 6 *Geo.* 4, c. 57. It may be that the omission arose from inadvertence on the part of the framer of the act, and it may have been intended to retain the former provision, that the occupation should be by the original hirer of the premises. But it seems to me that the words used do not expressly require such an occupation, and we are not to presume the intention of the legislature, we must collect it from the words of the act of parliament. Then if the meaning of the legislature be that which the words used naturally import, a settlement has been gained, provided there has been a residence of forty days. As to that the case is ambiguous, and for the purpose of ascertaining that fact, I agree that the case should go back to the Sessions.

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come within the fair meaning of the statute 43 *Eliz.* c. 2. By the first section of the statute the churchwardens and overseers of every parish are empowered to raise, weekly or otherwise, (by taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, &c. in the said parish, in such competent sums of money as they shall think fit,) a convenient stock of flax, hemp, &c., to set the poor on work: and also competent sums of money for the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work, &c., to be gathered out of the same parish, according to the ability of the same parish. The rate, therefore, is to be assessed upon the inhabitants and occupiers of lands and houses, "according to the ability of the parish." The latter words over-ride and control all the preceding general words of the section. The ability of the parish, means the ability of every individual inhabitant and occupier. These appellants have no ability, therefore they are not within the meaning of the section, and are not ratable. The poor rate is not a tax upon lands and houses, but a tax upon the person in respect of the property in lands or houses, and the ability arising therefrom, *Theed v. Starkey* (a). Lands or houses may, or may not, confer such ability, or they may, or may not, be evidence of it. In order to make a person ratable as an occupier, he must be shewn to have a beneficial occupation; he must be an occupier having ability. If the land or house yields no profit, the occupation of it is not beneficial, and is no evidence of ability; and such an occupier, having no ability *aliunde*, is not ratable. That is precisely the situation of the appellants in this case; they are not proper persons to be personally rated in respect of the houses they occupy: and the only persons ratable, are those who are proper persons to be personally rated in respect of the premises they occupy. In *Rex v. St. Luke's Hospital* (b), it was held, that the hospital was

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(a) 8 Mod. 314. See 1 Nolan's  
 P. L. chap. 6.

(b) 2 Burr. 1053; 1 W. Black.  
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not liable to poor rates for the lodging, &c., of the poor objects, Lord *Mansfield* observing that "it would be too gross to conceive them to be proper persons to be rated to the relief of the poor;" and in *Rex v. St. Bartholomew's Hospital* (a), that neither the governors, nor servants, nor the poor in the hospitals, were ratable to the poor. In *Eyre v. Smalpace* (b), the officers of Chelsea Hospital, who had separate and distinct apartments, which were considered their dwelling-houses, and in which they and their families resided, were held ratable; but they had a beneficial occupation, which conferred ability upon them: therefore they were persons proper to be rated in respect of their occupation and ability. In *Rex v. Waldo* (c), it was held, that an alms-house wholly occupied by objects of a charity and their attendants, and of which no profit was made, although the absolute property in it was in the person who gave the alms, had no legal occupier, and that the proprietor was not ratable in respect of it. And in that case it was not attempted to rate the objects of the charity, but the donor; here the attempt is to rate the donors of the charity indirectly, through the objects of it. It was, indeed, decided in *Rex v. Munday* (d), that the objects of a charitable foundation in the actual occupation of the alms-house and lands for their own benefit, in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, were ratable in respect of such occupation. But that case was essentially different from the present. There the occupation was a beneficial one; profit was made of the land and of the produce; the poor persons ploughed, sowed and reaped, and had their cattle upon the land; therefore they had a beneficial occupation; they were occupiers having some ability. Here the appellants are absolute paupers, having no beneficial occupation, and being possessed of no ability; therefore they are not ratable.

(a) 4 Burr. 2435; 1 Bott, 5th ed. 139.

(b) Cald. 3; 1 Bott, 5th ed. 131.

(c) Cald. 358.

(d) 1 East, 584.

BAYLEY, J.—I think this a very clear case, both as regards the words of the statute of *Elizabeth*, and the authorities upon the subject, and I have no hesitation in coming to the conclusion that these persons are properly ratable as occupiers of tenements within the parish. The statute directs the money to be raised “by taxation of every occupier of lands, houses,” &c. In *Rex v. Catt* (a) it was held that the master of a free-school, appointed by the minister and inhabitants of a parish under a charitable trust, whereby a house and garden were assigned “for the habitation and use of the master and his family, freely without payment of any rent, income, gift, sum of money, or other allowance whatsoever,” for the teaching of ten poor boys of the inhabitants, was ratable to the poor for his occupation of the premises. Lord *Kenyon* there said, “to the authority of the cases cited I subscribe my assent. They proceeded on the ground that there was no occupier. In *Rex v. Waldo* (b) the rate was held to be bad, because there was no occupier; the poor children who were placed there for education could not be considered as occupiers, neither could the woman servant who superintended them. That case could not be distinguished from that of *St. Luke’s Hospital*, where the rate was also quashed, because there was no beneficial occupier. But when a case arises where a person is found to be the beneficial occupier of a house, he must be rated, though the house be appropriated to charitable purposes. As long as *Richmond Park* continued in the hands of the king, it was not ratable: but when the ranger made profits of it, and beneficially occupied it, it was held to be ratable in his hands. So if this person had been put in merely to look after the pupils, and had not occupied the house, he would not have been ratable; but it appears that he is the beneficial occupier of this house and garden. By the old land-tax act, certain property given for charitable purposes is exempted from that tax: but there is no such exemption in the acts re-

(a) 6 T. R. 332.

(b) Cald. 358.

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specting the relief of the poor." In *Rex v. Munday* (a) the objects of a charitable foundation, in the actual occupation of an alms-house, were held to be ratable; and I cannot distinguish that case from the present in point of principle. The only difference is, that in that case the occupation was beneficial to a greater degree than it is here; there is merely the difference of plus and minus of benefit between the two cases. If the occupiers of alms-houses and lands belonging to a charitable foundation pay rent, they are clearly ratable; and if they do not pay rent, the consequence is that their ability is the greater. The objects of the charity in this case are, indeed, described as poor persons, but the Act of Parliament makes no distinction between poor persons and others. These persons are the occupiers of property from which they derive a benefit; therefore they are ratable. Mr. *Nolan*, in his treatise upon the Poor Laws (b), after citing the authorities upon this subject, says, "the distinction therefore as to where charities are ratable, and where they are not so, seems to depend upon this—whether there is any body who can be rated as *beneficial occupier*." I cite that work, not as an authority upon the subject, but merely for the purpose of shewing, that if the Merchant Tailors' Company, (the real appellants in this case,) or their legal adviser, had looked into the authorities collected in that work, they would probably have been satisfied that the rate was good, and would never have appealed against it.

LITLEDALE, J.—I entirely concur in the opinion expressed by my brother *Bayley* in this case. It is clear upon the authority of the case of *Rex v. Munday*, which cannot in substance be distinguished from the present, that the appellants were properly included in this rate.

PARKE, J.—I am of the same opinion. The parties rated were occupiers of houses within the parish, deriving

(a) 1 East, 584.

(b) 1 Nolan's P. L. 164, 3d ed.

a benefit from their occupation; therefore they were clearly ratable as occupiers within the meaning of the statute of *Elizabeth*. The fact of their being poor, and paying no rent, and occupying houses furnished to them by charity, can make no difference, because it does not render the occupation less beneficial, but rather the contrary. The statute of *Elizabeth* makes no distinction between poor persons and others, nor do any other of the poor laws. There are many statutes which provide against persons residing in houses provided for them by charitable institutions, thereby gaining settlements (*a*); and if it had been intended to exempt such persons from ratability to the poor, there would doubtless have been statutory provisions made expressly for that purpose.

Order of Sessions confirmed.

(*a*) See 54 Geo. 3. c. 170. s. 6. *Rex v. Sandhurst*, 1 M. & R. 98, n. (*a*).

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UPON appeal, a poor's rate for Stoke-upon-Trent, with county of Stafford, was amended, subject to the opinion of this Court on the following case:—

In the above rate, the occupiers of farms, lands, and tithes, and of market-tolls, were assessed, in respect of such property respectively, upon two-thirds of their estimated net yearly rent payable to the landlord; and the occupiers of houses, and other buildings, and of collieries and coal-mines, were assessed in respect of such property upon only one-half of their estimated net yearly rent, or royalty, payable to the landlord. Lessees of waterworks were assessed, in respect of their works and pipes within the parish, upon only one-half of their estimated yearly rental value; but the rate was amended by the Court, as to the lessees, by assessing them upon two-thirds of such rental value, being in the same proportion as in the case of land.

The question for the consideration of this Court is, whe-

A poor rate imposed in respect of two-thirds of the net rent of farms, lands and tithes, and of one-half of the net rent of houses and other buildings, collieries, and coal-mines, is not necessarily unequal.

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ther as the occupiers of farms, lands, &c., are rated upon two-thirds of the estimated net yearly rent, the occupiers of collieries and coal-mines ought not to be rated in the like proportion, upon two-thirds of the estimated net yearly mine rent, or royalty?

*Shutt and Godson*, in support of the order. There is nothing on the face of this rate to shew that its nominal inequality is not founded upon the greater amount of deductions attaching to one species of property. Then as no unequal principle of assessment is disclosed by the rate itself, no such inequality will be presumed. In *Rex v. Brograve* (a), Lord Mansfield said, that he thought it right that a difference should be made between lands and houses, for there are several charges incident to houses which do not fall upon lands, to lessen their value. And Mr. Justice Yates said, "The Court cannot enter into the inequality of it, unless it appears to us to be self-evidently, necessarily, and unavoidably unequal." *Rex v. Hardy* (b). *Rex v. Sandwich* (c). *Rex v. Aire and Calder Navigation* (d).

*Alderson and Whately* contra. Net rent excludes the supposition of further deductions. The rate being manifestly unequal, this Court will quash it. *Rex v. Sellers* (e).

BAYLEY, J.—By the rate in question, all property in this parish was assessed with reference to the net yearly rent; but in the case of lands, the rate is imposed in the proportion of two-thirds of the net rent; whereas upon houses and collieries, it is imposed in the proportion of one-half. Had this proportion been fixed by a rule evidently wrong the Court would be bound to interfere; but we are of opinion that a difference may with propriety be made in the

(a) 4 Burr. 2491, & 1 Bott, 5th edit. 112.

(b) Cowp. 579.

(c) Dougl. 562; Caldec. 105.

(d) 2 T. R. 660.

(e) Caldec. 522, S. C. per nomen *Rex v. Lakenham*, 1 Bott, 5th edit. 116.

proportion of net annual rent, in rating these two classes of property. What that proportion should be it is the province of the quarter sessions to decide. The rate is to be assessed upon the *annual value*, whether the party be owner or tenant; but the annual *rent* exceeds the annual value by that portion of the former which ought to be set aside to meet repairs and other casualties. This portion would be greater in respect of houses, upon which more repairs in proportion to the rent are often necessary than will in general be required upon a farm. So in the case of collieries, prudence requires that a part of the annual rent be set aside to meet the necessary expenses of repairing and occasionally renewing the machines. It was contended that the sessions, in adopting the *net* rent as a standard, must be taken to have looked at the clear rent after every deduction made. This term is, however, frequently used to denote that rent which reaches the pocket of the landlord after allowing taxes and other disbursements which the tenant is entitled to deduct from the gross rent, and also the charge of collecting. This construction will support the rate.

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Order of Sessions confirmed.

The KING v. LORD GRANVILLE.

LORD GRANVILLE appealed against a rate made 22d February, 1828, for the relief of the poor of the parish of Stoke-upon-Trent, whereby he was rated for a colliery, including engines and railway, at 61*l.* 17*s.* 5*d.*, being a rate made upon the sum of 989*l.* 18*s.*; and the sessions confirmed the rate, subject to the opinion of this Court upon the following case.

The lessee and occupier of a coal-mine is ratable for the full annual value of the mine, though increased by improvements made at his own expense.

The appellant is the lessee and occupier of a colliery in the parish of Stoke-upon-Trent. In the year ending on the 31st of December last, he paid to his landlord for royalty a mine rent upon the coals raised from the said colliery, namely, the sum of 802*l.* 8*s.*, which sum is a *fair mine rent*



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it, although he underlets the rest, he is considered in point of law, the occupier of the whole. If this is the right construction of the word "occupied" as used in this statute, which I think it is, it follows that the pauper's husband occupied the house, and then the only remaining question is, whether there was forty days' residence by the pauper's husband. Upon that point there is some doubt, and it is an essential point, for the legislature did not intend by the 6 Geo. 4, c. 57, to alter the law in that respect. I agree with my brother *Bayley* that the case ought to be sent back to the Sessions to have this doubt cleared up, and the fact distinctly ascertained.

PARKE, J.—I have entertained considerable doubt in this case, but upon the whole I incline to think that there was a sufficient occupation, and that a settlement was acquired in the parish of Lyncombe and Widcombe. The question turns entirely upon the construction of the 6 Geo. 4, c. 57. My judgment may have the effect of defeating the intention of the framers of that statute. But it is a safe rule of construction not to speculate upon the probable intention, but to adhere to the words of an act of parliament in their grammatical and natural sense, unless it appears certainly and clearly from the context that they were intended to be used in some other sense. There is a material difference between the two statutes 6 Geo. 4, c. 57, and 59 Geo. 3, c. 50. The last-mentioned statute expressly requires the house to be held, and the land to be occupied, and the rent to be paid, by the person hiring the same. The statute 6 Geo. 4, c. 57, omits the words "by the person hiring the same." It does not require that the rent shall be paid, or the house occupied, by the person hiring the same, but only that the house shall be occupied *under the yearly hiring*. Now those words may be satisfied by the continuance of the term, and by the occupation of a sub-tenant or assignee during the continuance of that term. It is not necessary for the purposes of this case to decide

whether occupation by an assignee would be sufficient or not. There has been an occupation here by a person whose character is left doubtful, for it is not stated in the case whether he was a sub-tenant having an entire occupation of one part of the house, or whether he was a mere lodger. But it seems to me that there was an occupation by the pauper's husband under the yearly hiring, provided the premises continued in the occupation of any person entitled under the tenancy created by the yearly hiring. I find nothing in the context of this clause to shew that the words which are there used, taken in their plain natural sense, do not express the intention of those who used them; and I must, therefore, suppose that the legislature, when they repealed the 59 *Geo.* 3, c. 50, which expressly required an occupation by the person hiring, had reasons for omitting, and intended to omit those words in the 6 *Geo.* 4, c. 57. It may be that the omission arose from inadvertence on the part of the framer of the act, and it may have been intended to retain the former provision, that the occupation should be by the original hirer of the premises. But it seems to me that the words used do not expressly require such an occupation, and we are not to presume the intention of the legislature, we must collect it from the words of the act of parliament. Then if the meaning of the legislature be that which the words used naturally import, a settlement has been gained, provided there has been a residence of forty days. As to that the case is ambiguous, and for the purpose of ascertaining that fact, I agree that the case should go back to the Sessions.

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raised, and the quantity raised being increased by the engines and the railway, the rate upon the coal is in reality a rate upon the engines and the railway.

BAYLEY, J.—I entertain no doubt in this case. Whether the sessions have made proper deductions from the rate, we are not called upon to decide; the only question proposed for our consideration is, whether the appellant is liable to be rated for the engines and the railway? I am clearly of opinion that he is so liable. If the owner of the mines had been the occupier of them, he would have been liable to be rated according to their improved annual value; and where the owner of a mine erects machinery, or in any other way by expenditure of money improves the value of the mine, he is ratable for the value of the mine so improved by his expenditure. If he lets the mine in its improved state, he will receive the larger royalty from the tenant. If he lets it to a tenant who is to incur the expense of erecting machinery, the owner will receive the less royalty, but as a greater quantity of coal will be raised in consequence of the improvement, the tenant will by those means be reimbursed his expenditure, and in such cases the tenant, being the occupier, is, in my opinion, liable to be rated according to the improved value.

LITLEDALE, J.—The appellant, by erecting the engines and the railway has increased the annual value of the mines by 187*l.* 10*s.*, and the question is, whether he is liable to be rated for that increase? In ordinary cases the rate is to be made in proportion to the rent. In this case the appellant, by his improvements, has rendered the mines more productive. But it is quite immaterial, as regards the question of ratability, whether money is expended in improvements effected by the landlord, or by the tenant; their bargain may vary on that account, but the occupier of the property is the person to be rated, and he is ratable according to its improved annual value. The appellant, therefore,

being the lessee and occupier of these mines, has been properly rated for their improved annual value.

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PARKE, J.—Whether the rate is strictly correct in amount may be doubted, but we are not called upon to resolve that doubt. The sessions seem to have calculated the value of the premises according to the rent for which they might be let to an under-tenant. That, perhaps, may not be the proper principle upon which such property should be rated, because the annual value is only part of the annual rent, and a portion of the rent should be considered applicable to repairing and maintaining the machinery, *Rex v. Tomlinson (a)*, where that distinction is taken. But the only question put to us is, whether it is right in principle that the lessee of a mine should be rated for an increased annual value produced by improvements effected by himself? Upon that I feel no doubt; I think he has been properly rated for the improved annual value.

Order of Sessions confirmed.

(a) *Ante*, 169.

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DEBT upon the statute 3 Geo. 4, c. 126, s. 65 (a), for By 3 Geo. 4, penalties. Plea, nil debet, and issue thereon. At the trial c. 126, s. 65, no trustee of a turnpike road shall enjoy any office or place of profit under any act of parliament in execution of which he shall have been appointed, or shall act; and if any such trustee shall, without having first resigned such office, hold any such office, he shall forfeit 100*l*. A trustee who holds the office of treasurer, which may be made an office of profit, is within the penalty of the act, though he makes no profit of it in his own person.

(a) Which enacts, “ that no trustee or commissioner of any turnpike road shall, from and after this act shall be in force, enjoy any office or place of profit under any act of parliament in execution of which he shall have been appointed, or shall act as trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in, any contract or bargain for making

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before *Gaselee, J.*, at the Berkshire Summer Assizes, 1828, the case was this. The defendant, on the 5th of August, 1822, was elected treasurer under a local act for repairing the turnpike road leading from the Old Gallows, through Wollingham, to Virginia Water. He was at that time a trustee under the same act, and he did not, upon his election to the office of treasurer, resign his office of trustee. *Mr. Roberts*, the clerk to the commissioners, who was an attorney, and also acted as a banker, and who had preceded the defendant in the office of treasurer, which he had resigned upon being appointed clerk, received all the rents of the tolls, and made all payments on account of the trust. The defendant never exercised any control over the money, and never made any profit of it. In the year 1822, the balance in the hands of *Mr. Roberts* was less than 200*l.*; in 1824, 1825, and 1826, it was more than 200*l.*; and in 1827, it was more than 600*l.* During all these years there was a fluctuating amount of debts owing by the trustees to various individuals, of from 200*l.* to 300*l.* In October, 1825, the defendant's accounts, as treasurer, were audited and allowed at a meeting, where he himself presided as chairman. The learned Judge being of opinion that the defendant could not be considered as holding any office or place of profit within

or repairing, or in any way relating to the road for which he shall act, or for building or repairing any toll house, &c.; nor shall any such trustee or commissioner let out for hire any waggon, &c., for the use of any turnpike road for which he shall act as a trustee or commissioner; nor by himself, or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act, during the time he shall be acting as a trustee or commissioner of such road; and if any person,

after having been appointed or elected a trustee or commissioner of any turnpike road, shall, without having first duly resigned such office at some meeting of the trustees of the road for which he shall have been elected or appointed, hold any such office or place, or be concerned in any such contract or bargain, or let out for hire any waggon, &c., or receive any money out of the tolls as aforesaid, every trustee or commissioner so offending shall for every such offence forfeit and pay the sum of one hundred pounds to any person or persons who shall sue for the same."

the meaning of the act of parliament, nonsuited the plaintiff, but gave him leave to move to enter a verdict for one penalty of 100*l.*, in case the Court should entertain a different opinion. A rule nisi had been obtained accordingly, against which

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*Alderson* now shewed cause. The nonsuit was right, and this rule must be discharged. The action is founded upon a highly penal statute, which must, therefore, be construed strictly; and so construing it, it is impossible to say that the defendant held an office or place of profit. There is no salary attached to the office of treasurer; there was never any cash balance lying in the defendant's hands; and the defendant never made any profit. It is not, therefore, such an office as the legislature contemplated; for the term "office of profit" must mean an office, not merely capable of yielding profit, but by which profit is necessarily and actually made. At any rate the rule cannot be made absolute in the terms prayed for, because it was a question of fact for the jury whether the office was one which yielded profit to any person; the utmost the Court can do, therefore, if they put a different construction upon the statute from that now contended for, will be to grant a new trial.

*Taunton* and *Talfourd*, contra. The question arising upon this statute is, not whether the defendant actually made a profit of the office of treasurer in his own person, but whether it is an office of which, from its nature, he might have made a profit. It is said that the defendant had no salary, and that the cash balances were not kept in his hands. But suppose there were a salary attached to the office of treasurer, would it be less an office of profit because the treasurer permitted some other person to receive the salary? Certainly not. Neither is there any real distinction between the advantages of a fixed salary, and those notoriously resulting from a control over fluctuating balances of cash. Therefore, whether the possession of those balances

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produced a profit to the defendant, or to *Roberts*, is perfectly immaterial; and it is hardly possible to imagine that *Roberts*, as an attorney practising in the county, did not derive some advantage from having the control over the trust funds, inconsiderable as they were in amount. The fact that *Roberts* continued to act as treasurer in the defendant's name, after he could no longer safely do so in his own, in consequence of his having been appointed clerk to the trust, proves that the office of treasurer was one of value, and possessing desirable advantages connected with it. Even if the balances produced no profit either to the defendant or to *Roberts*, still, as either of them might have derived profit from their control over them, that brings the case within the purview of the act of parliament. At all events the nonsuit was wrong, because the question whether the office of treasurer was in fact one of profit either to the defendant or to *Roberts*, ought to have been, but was not, left to the jury. Under any view of the case, therefore, the Court will make the rule absolute, either to enter a verdict for the plaintiff, or for a new trial.

BAYLEY, J.—I think the real and proper question in this case was, not whether the defendant in his own person actually made a profit of the office, but whether the office was in its nature such as might enable him to make it profitable either to himself or to *Roberts*. Now, if the available balance in the hands of *Roberts* were such, that it might be fairly and reasonably expected that a man of business would make a profit of it, the office of treasurer must be considered as one of profit within the meaning and mischief of the act of parliament. Instead of nonsuiting the plaintiff, therefore, the learned judge should, as it seems to me, have left it to the jury as a question of fact, whether the average balance in the hands of *Roberts* was such that a man of business might fairly and reasonably be expected to make a profit of it. In this view of the case I am of opinion that we ought to make the rule absolute for a new trial.

LITLEDALE, J.—I am of the same opinion. If the average balance was so trifling in amount, that a banker would not have allowed interest for it, the office might, perhaps, in that case, be considered as not being an office of profit within the meaning of the statute. On the other hand, if it amounted to a sum for which a banker would have allowed interest, it must clearly be considered as an office of profit, whether the party receiving it obtained that allowance of interest or not (a). In that point of view it is immaterial, whether the defendant received the profit himself, or permitted *Roberts* to receive it, or whether neither of them received it; the office was one of which profit might be made, and the defendant, by holding it jointly with his office of trustee, has incurred the penalty inflicted by the act of parliament.

PARKE, J.—The question in the case is, whether the office of treasurer is an office of profit within the meaning of the 3 Geo. 4, c. 125, s. 65. With a view to the proper decision of that question, I think it should have been left to the jury, upon the evidence, to say, whether there was such an average balance in the hands of *Roberts*, that it might reasonably be expected that the person holding that balance would make

(a) Query, whether, if the money be suffered to lie in the hands of a banker who allows no interest upon balances, but who is remunerated for his trouble by the profit which he, the banker, derives from the floating balances of his customers, this be not a sufficient profit within the act, either as a profit made by the treasurer or his agent, in the shape of the advantage which he derives from the services of his banker, or as a profit made by the banker, as a person acting under the treasurer, *quoad* the receipt of the trust money. An agent paying money into his banker's hands *generally*, and using it

as his own, is chargeable with interest, whether he receive interest or not. *Rogers v. Boehm*, 2 Esp. N. P. C. 702. So an assignee, *Trevors v. Taylor*, 1 Brown, C.C. 384. So an executor, *Newton v. Bennett*, *ibid.* 359; *Perkins v. Baynton*, *ibid.* 375; *Foster v. Foster*, 2 Bro. C. C. 616; *Littledale v. Gascoyne*, 3 Bro. C. C. 73; *Franklin v. Frith*, *ibid.* 483; *Horsley v. Chalenor*, 2 Vez. sen. 83. (But see *Adams v. Gale*, 2 Atk. 106; *Child v. Gibson*, *ibid.* 603.) So a partner, Pothier, *Traité du Contrat de Société*, ch. 7, Nos. 116, 119.

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a profit of it. I agree, therefore, that there ought to be a new trial.

Rule absolute for a new trial (a).

(a) At the second trial of the cause, before *Vaughan*, B., at the Berkshire Summer Assizes, 1829, it appeared upon the examination of Mr. *Roberts*, that the balances in his hands were always mixed up with moneys of his own; that he was accustomed to advance sums of money to different persons on interest, and that in so doing, he must occasionally have received interest upon advances in part composed of such balances; but that he had always available resources of his own, with which he could at any time have paid the whole fund due from him to the trust. Upon this evidence the learned Baron left it to the jury to say whether or not the office was an office of profit; telling them, that, in his opinion, if profit was made by *Roberts*, the office was an office of profit, as it was immaterial by whom the profit was made. The jury gave it as their opinion that the office was an office of profit, and that *Roberts* had made profit of it, and thereupon, under his lordship's direction, found a verdict for the plaintiff.

In Michaelmas term, 1829, *Ludlow*, Serjt., moved for a rule nisi for a new trial, upon the ground that the learned Baron had misdirected the jury in point of law. He contended, that in order to bring the defendant within the penalty of the statute, it should have been proved that *he*, personally,

derived a profit from the office, and he cited *Skinner v. Buckee*, 4 D. & R. 628, 3 B. & C. 6, as an authority in principle, though decided upon a different act of parliament. He admitted that the statute in that case imposed the penalty upon a party doing the prohibited act "*for his own profit*," but contended that the expression in the present statute "*enjoy any office or place of profit*," bore the same meaning, and shewed that the legislature intended to impose the penalty on those only who "*enjoyed*," i. e. *personally received* a profit from the office.

The Court said, that the two acts of parliament were materially distinguishable. A man's "*enjoying an office of profit*," was a very different thing from his "*supplying goods for his own profit*." The case had been once argued upon the very point now raised, and had been properly decided; the jury had at the last trial been directed in accordance with that decision, and had found a right verdict. It was wholly immaterial under this act of parliament by whom the profit was received; if the office was one by which profit was made, or might be made, either by the person holding it, or any other person who acted in it for him, it was an office of profit, within the meaning of the statute. And the motion for a new trial was refused.

SMALL and another, Assignees of CAMPION, a Bankrupt,  
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**ASSUMPSIT** for money had and received to the use of the plaintiffs, as assignees, with the other money counts. Plea, non assumpsit, and issue thereon. At the trial before *Bayley, J.* at the Yorkshire summer assizes, 1828, the case was this. The plaintiffs were the assignees of one *Campion*, a bankrupt, and they brought the action against the defendant, who was chief bailiff of the liberty of Langborough, in the North Riding of Yorkshire, to recover the sum of 161*l.*, the value of certain effects of the bankrupt which had been sold by the defendant under an execution. The only question in the cause was, whether *John Barr*, the petitioning creditor, had or had not a good petitioning creditor's debt; and that question depended upon the operation of a composition deed which had been executed by the bankrupt about ten weeks prior to the seizure of the goods. The deed was made between the bankrupt, of the first part; *John Barr, Thomas Hudson, Robert Johnson, and Thomas Coser*, creditors of the bankrupt, of the second part; and the several persons whose names were thereunder written, or thereunto annexed, and seals affixed, also creditors of the bankrupt, of the third part. It recited that the bankrupt was indebted to the several persons, parties of the second and third parts, in the several sums of money set opposite to their respective names in the schedule thereto annexed; that he was unable to discharge those debts; that he had proposed to assign to *Barr, Hudson, Johnson, and Coser*, all his personal estate and effects, upon the trusts thereafter mentioned; and that they, and the creditors parties thereto of the third part, had agreed to accept such assignment in full satisfaction and discharge of their debts, and to give releases for the same as thereafter mentioned. It then witnessed, that, for the considerations therein mentioned, the bankrupt had granted, bargained, sold, assigned, transferred and set over unto *Barr*,

A debt which the creditor has covenanted with the debtor not to sue him for, is not a good petitioning creditor's debt.

Goods were assigned by *A.* to *B., C., D.,* and *E.*, upon trust to pay themselves and such other creditors of *A.* as should execute the deed, provided the trustees and creditors executed on or before a certain day. The deed contained an absolute covenant that the trustees and creditors would not sue, arrest, implead, or prosecute *A.* or his executors, &c., or his or their goods, lands, &c. The deed was executed within the time by *B.* and *C.*, but not by *D.* or *E.* The deed enures as a release of the debts owing to *B.* and *C.*, and a commission of bankrupt afterwards issued by *B.* is void for want of a subsisting petitioning creditor's debt.

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*Hudson, Johnson, and Coser*, all and every the household goods and furniture, and all the stock in trade, goods, wares and merchandise, book and other debts, bonds, notes, bills and securities, of or belonging to him, the bankrupt, to have, hold, receive and take all and singular the said household goods, &c., thereby assigned to them, their executors, &c., wholly and absolutely as their own proper goods and chattels, upon trust, that they, or the survivor of them, his executors, &c., should sell and dispose of all the said personal estate and effects, and get in the debts and monies owing to the bankrupt, and stand and be possessed of the money so to be received, in trust; first to pay certain costs therein mentioned, and then to pay themselves and the other creditors the amount of their debts, ratably, provided the parties thereto of the second and third parts should, on or before the first of February then next, make proof of their debts, if required, and execute the deed. It then contained a covenant by the trustees and creditors, to and with the bankrupt, his executors, &c., that they the said creditors, parties thereto of the second and third parts, would not sue the bankrupt for their debts, and that, in case any of them did, the deed should be a sufficient release and discharge, both at law and in equity, to the bankrupt; and the bankrupt should be thereby acquitted and discharged from the said debts. The deed was executed by only two of the trustees, *Barr* and *Hudson*. It was contended on the part of the defendant, that *Barr*, the petitioning creditor under the commission, having executed the deed, had thereby released his debt, and consequently that there was no petitioning creditor's debt. On the other hand it was insisted, on the part of the plaintiffs, that the deed itself, having been executed by two only of the four trustees, was void, and consequently that *Barr's* debt was not extinguished. The learned Judge was of opinion that *Barr's* debt was extinguished by his execution of the deed, and therefore nonsuited the plaintiffs; but leave was given to move to enter

a verdict for the plaintiffs, if the Court should be of a different opinion. A rule nisi having been obtained accordingly,

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*Hutchinson* now shewed cause. Parties who are privies and have assented to a deed of assignment for the benefit of creditors, cannot set it up as an act of bankruptcy, *Bamford v. Baron* (a), but other persons may; and it is no objection to an action brought by assignees of a bankrupt to recover part of the bankrupt's estate, that some of them have concurred in such a deed: for the objection applies only to the petitioning creditor, who originates the commission, *Tappenden v. Burgess* (b). *Doe v. Anderson* (c) will perhaps be relied upon by the other side, because it was there held, that a creditor who was ignorant that an act of bankruptcy had been committed by his debtor, and who executed a composition deed for the amount of his debt, and received a dividend under it, might still become a petitioning creditor in respect of the original debt. But the ground of that decision was, that the deed being void by means of the previous act of bankruptcy, could not operate in extinguishment of the debt; whereas here the deed is valid, for there was no *previous* act of bankruptcy, and did operate in extinguishment of *Barr's* debt, he being a party to it. It will perhaps be urged that there was another act of bankruptcy *subsequent* to the deed, and that *Barr* not being privy to that, is a good petitioning creditor, although a party to the deed. But the answer is, that his

(a) 2 T. R. 594. A trader commits an act of bankruptcy by assigning all his stock in trade to A., who is a party to and executes the deed of assignment. A. cannot be a petitioning creditor in a commission grounded on that act of bankruptcy. Per Lord *Ellenborough*, in *Jackson v. Irvin*, 2 Campb. 49. Nor can a creditor, who, with-

out executing, has assented to the deed, by approving of acts done under it by the trustees. Per *Gibbs*, C. J. in *Back v. Gooch*, 4 Campb. 232, Holt, N. P. C. 13. And see *Hicks v. Burfill*, 4 Campb. 235, n.

(b) 4 East, 230; 1 Smith, 33.

(c) 5 M. & S. 161; 1 Stark. N. P. C. 262.

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debt was already actually extinguished; if he had brought an action for it, the deed and the release contained in it might have been pleaded in bar, *Dean v. Newhall* (a); and a debt for which a party cannot sue in a Court of law, is not such a debt as will support a commission of bankrupt. Lastly, it will be contended that the deed is absolutely void, because it was executed by two only of the four trustees. But that objection cannot prevail. The effect of that is, not to render the deed void, but to prevent the trustees who did not execute it from taking the benefit of its provisions. The deed itself is equally valid; it passed the property out of the bankrupt, and might have been enforced against him.

*J. Williams*, contra. *Bamford v. Burgess* (b), and *Tappenden v. Burgess* (c), are authorities to shew that a creditor who has become a party to a composition deed, and has received a dividend under it, cannot afterwards set it up as an act of bankruptcy. But they go no further. *Doe v. Anderson* (d) does go further, and that is an authority to shew that a creditor who, in ignorance that his debtor has committed an act of bankruptcy, executes a composition deed for the amount of his debt, and receives a dividend under it, may become a petitioning creditor in respect of his original debt, because the deed is wholly void by the previous act of bankruptcy, and therefore does not extinguish that debt. In this case, even if the deed is not absolutely void, it is at least voidable; it might have been avoided at any moment, and set up as an act of bankruptcy, by any one of the creditors who did not execute it: and such a deed will not operate as an extinguishment of a debt.

(a) 8 T.R. 168, where it was held, that the obligee of a bond having covenanted not to sue one of two joint and several obligors, and having nevertheless sued him, the deed might be pleaded in bar,

although he might still sue the other obligor.

(b) 2 T.R. 594.

(c) 4 East, 230; 1 Smith, 33.

(d) 5 M. & S. 161; 1 Stark. N.P.C. 262.

But the deed is absolutely void, and not voidable only. It is not to take effect until all the four trustees have executed it; their execution of it is a condition precedent to its having any operation at all. The trust is joint, not joint and several; it is to the four trustees, or the survivor of them: and there is a proviso that the parties of the second part, *i. e.* the four trustees, shall execute the deed on or before a specified day. That proviso has never been observed, and the deed, consequently, is void for non-performance of the condition precedent. Lastly, even if the deed could be held valid, it would still not operate to extinguish the debt; its utmost effect would be to take away the remedy. The creditor may be prevented by the deed from suing his debtor; but though the remedy may be gone the debt may remain, and may be a good debt to support a commission of bankrupt.

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*Cur. adv. vult.*

BAYLEY, J.—This was a motion to set aside a nonsuit and to enter a verdict for the plaintiffs. The question raised upon the argument of the case was, whether *Barr*, the petitioning creditor, was precluded by the deed of assignment executed by the bankrupt for the benefit of his creditors in December, 1826, from suing out the commission which issued in May, 1827. It was admitted that, independently of the deed, there was a good act of bankruptcy, by lying in prison for two months, subsequent to the date of the deed. The bankrupt, by the deed, conveyed all his personal estate and effects to *Barr* and three other persons, upon trust, first to discharge certain costs, and next to pay themselves and the other creditors ratably, in proportion to the respective debts. The deed contained this proviso:—Provided that the said parties of the second and third parts shall on or before the first day of February next make proof of their debts, if required, “*and execute these presents.*” It was contended at the bar that the words “and execute these presents” constituted a condition pre-

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cedent, and that the deed, having been executed by *Barr* and one other of the four trustees only, was, by the non-performance of that condition, absolutely void, and, consequently that *Barr's* debt was not extinguished, but subsisted as a good petitioning creditor's debt to support the commission. We are of opinion that the effect of those words in the proviso is, not to avoid the deed in case the parties named in it do not execute it by the day limited, but merely to deprive such parties of the right to receive any dividend under the deed. The deed contained a covenant by the creditors not to sue, arrest, implead, or prosecute the bankrupt, or *his goods or chattels, lands or tenements*, for or on account of any debt; and if any of them did, that the deed might be pleaded as a release of any such debt. Now the issuing a commission is a species of suit or proceeding against the bankrupt; therefore, this deed, if valid, would prevent the issuing of a commission. It was, however contended that the deed was wholly void upon the ground of its not having been executed by all the trustees. We have looked into the authorities bearing upon this point, and we are of opinion that they are decisive to shew that the deed is not void on that ground. I proceed to notice some of the leading cases. One of the earliest is that of *Smith v. Wheeler (a)*. There, *Maine*, being possessed of two parts of a rectory for 80 years, in 1643, by indenture, made an assignment of them to *Crook* and *Bleak*, upon trust for himself for life, and after his decease for payment of his debts, and for the raising of several sums to be paid to divers of his kindred; with a proviso, that if he should leave issue, then upon trust for such issue. It was found upon special verdict that he had issue a son, and that he took the profits during his life, that the assignees had no notice of the trust during his life, and that after his death one of them assented and the other dissented (*b*);

(a) 1 Ventr. 128; 2 Keb. 564, 608; 1 Lev. 279.

(b) It does not appear in what manner the dissent was expressed,

but the interest being a chattel, a disclaimer by parol would have been sufficient. *Vide Sheppard's Touchstone*, 285, *post*, 191, n.

that in 1648 he committed treason, of which he was afterwards attainted, and died in 1661; and that the crown granted his interest to *Smith*, the plaintiff. The question, was, whether the whole term was forfeited by the attainder, which must clearly have been the case, unless the term had passed to the trustees under the assignment. It was adjudged by *Tyrrel* and *Archer* in the Common Pleas, they being the only judges then in Court, for the defendant *Wheeler*, that it was not forfeited. They must, therefore, have been of opinion that it had passed to the trustees. Their judgment was affirmed after argument, in error, in the Court of King's Bench, and *Hale*, C. J. said, "*Crook* is a good lessor, for the other trustee's disagreement makes the estate wholly *his*." Although the deed remained with the assignor during the whole of his life, and the assignees knew nothing of it until after his death, the whole term was held to vest in the one of the two trustees who assented to the deed. That case, therefore, establishes, that where there is an assignment to two trustees, one of whom assents and the other dissents, the whole estate vests in the assenting trustee. The assignor may, by express proviso, make the deed void unless all the trustees execute the deed, or otherwise assent to the trust estate; but unless he does so by express proviso, that case shews that the property will vest in the assenting trustee. In *Crewe v. Dicken* (a), it appeared that one of two trustees for the sale of an estate not chusing to act under the trust deed, released, and conveyed to his co-trustee all his estate and interest. The other trustee contracted to sell the estate to the defendant *Dicken*, who refused to complete the purchase unless both the trustees joined in giving a receipt for the purchase money. *Crewe*, the acting trustee, thereupon filed a bill against *Dicken*, the purchaser, to compel him to complete the purchase. It was insisted that *Dicken's* objection was well founded, and that he could not be compelled to accept a conveyance and take a receipt from one of the trustees only. Lord *Loughborough* was of opinion that if the other trustee

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(a) 4 Ves. 97.



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had merely renounced without doing any other act, the whole estate would have been vested in the acting trustee, in the same manner as if the other trustee had died during the life of the testator; but he thought that the other trustee could not have released without having assented to the conveyance; and upon that ground he held that the purchaser could not be compelled to complete his contract. That case, therefore, is an authority to shew, that where there is a conveyance to two trustees, one of whom assents, and the other dissents, without doing any act to shew that he ever assented, the whole property vests in the assenting trustee; but that where both trustees have once assented, both must join in giving the purchaser a receipt for the purchase money, and that the act of releasing by one amounted to evidence that he had once assented to the conveyance. That decision, as regards the last point only, was afterwards corrected by Lord *Eldon* in the case of *Nicolson v. Wordsworth* and *Hutton* (a). There the purchaser of an estate filed a bill against the defendants to compel them to execute a conveyance. It appeared by the answer that the defendants had been made executors under the will of one *Richard Wordsworth*, but that *Hutton* had renounced probate, and refused to act; and had by indenture bargained, sold, *releused*, quitted claim and conveyed to the other executor, his heirs and assigns, his estate in the property. It was contended on the one hand that the release was equivalent to an acceptance of the devised estate; and on the other that the release, being made with an intent to disclaim, was equivalent to a disclaimer. Lord *Eldon*, after hearing the case argued, is reported to have said, "It seems to have been taken for law from an older period than the date of *Crewe v. Dicken*, and sanctioned by Lord *Hale*, that if an estate is conveyed to two persons in trust, and one will not act as trustee, the estate vests in the other. If, therefore, the party executes a simple instrument, and under his hand and seal declares that he disclaims,—that is,

(a) 2 Swanst. 365.

dissents from being a trustee,—the fact must be taken to be that he is no trustee. But in *Crewe v. Dicken* the difficulty occurred that, instead of doing this, the party conveyed his estate to the other trustee. His lordship then alluded to Lord *Loughborough's* opinion upon the effect of the release, and added, “If the essence of the act is disclaimer, and if this point were *res integra*, I should be inclined to think that if the mere fact of disclaimer (*a*) is to

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(*a*) As the law stood in the time of Lord *Coke*, (*Butler and Baker's* case, 3 Co. Rep. 25,) where an estate of freehold was once vested, the party could get rid of that estate only by conveying it over, or by disclaiming, either in a court of record, or by some public and notorious act, wholly inconsistent with an acceptance of the estate, (as to which, however, see H. 17 E. 3, fo. 6, pl. 18; Fitz. Abr. Estoppel, pl. 217.) The former course would often leave him liable to serious responsibility. But the disclaimer appears to afford complete indemnity; as it is difficult to imagine any burthen from which the party could not relieve himself by resorting to a court of record either as tenant, vouchee, prayee in aid, or deforciant in a real action, or as plaintiff or defendant in a personal action, or by doing some act inconsistent with an acceptance of the estate. But though no inconvenience could arise to the party himself, by suffering the option to remain in him till he was called into action, the suspense and delay were found to be injurious to the interests of those who would take upon the disclaimer. They had no means of compelling an election. It was, therefore, thought advisable to resort to the execution of a

deed of disclaimer, which required neither the occurrence of a state of things which should call upon the first taker to do an act in pais, nor the prosecution or defence of a proceeding in a court of record. This course has now prevailed for nearly half a century amongst conveyancers, and seems to be recognized by the case of *Crewe v. Dicken*, cited in the principal case, though the point was not there discussed, and the old distinction between real and personal estate does not appear to have been adverted to. And see *Adams v. Taunton*, 5 Madd. 435. Fortunately for the judicial establishment of this novel expedient, an action of covenant was a few years since brought by the representatives of a mortgagee against the mortgagor, who, being unprepared with the amount of the debt, for the sake of gaining time demurred to the declaration, on the ground that the plaintiff derived title through a deed of disclaimer. This demurrer, in the absence of the defendant's counsel, was argued by a person into whose hands a mere copy of the demurrer book had been placed but a few hours before. The decision was in favour of the plaintiff, and the defendant, having gained all the delay

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remove all difficulties, and vest the estate in the other trustee, a party who releases, and thereby declares that he

he wanted, declined carrying the case further. See *Townson v. Tickell*, 3 B. & A. 31. The judgment of the Court there proceeded partly on the supposed inconvenience of the old rule, and partly on the authority of two cases, viz. *Thompson v. Leach*, 2 Ventris, 198, and *Bonifaut v. Greenfield*, Cro. Eliz. 80, and 1 Leonard, 60. In the first of these cases, *Pollersfen*, C. J., and *Powell* and *Rokeby*, Justices, held against *Ventris*, J., that where tenant for life surrenders to the remainder man in tail, who afterwards assents to the surrender, the assent shall not relate back to the surrender, but that the surrender shall take effect only from the time of the assent. This appears from Ventris's statement to have been determined on the ground that a surrender is inoperative without an *express* assent on the part of the surrenderee. Upon the argument of the case of *Townson v. Tickell*, 3 B. & A. 31, the Court was not apprized that the judgment of the majority of the Court of Common Pleas, in *Thompson v. Leach*, though affirmed in K. B., (3 Mod. 296,) was reversed in Dom. Proc. (15 Lords' Journals, 163,) and that in a subsequent action between the same parties, the Court of King's Bench adopted the opinion of *Ventris*, J., which had been thus confirmed by the judgment of the Court of last resort, 2 Salk. 618. The application of the decision of the Court of Common Pleas in *Thompson v. Leach*, supposing it to have been correct, to the case of a devise,

appears to be repugnant to the rule laid down by Lord Coke: "In the case of a devise by will of lands, whereof the devisor is seised in fee, the freehold or interest in law is in the devisee before he doth enter; and in that case nothing, having regard to the estate or interest devised, descendeth to the heir." Co. Litt. 111, a. and 2 Tho. Co. Litt. 645; sanctioned by *Abbott*, C. J., who, in *Doe d. Smyth v. Smyth*, 6 B. & C. 112, 116, 9 D. & R. 136, says, "It is clear that a *devised* interest vests in the devisee, by presumption of law, before entry." *Bonifaut v. Greenfield* merely determined that where one of three executors, to whom lands are devised for sale, refuses by parol to act, such refusal, inasmuch as it deprives him of the character of *executor*, vests the power of sale in the acting executors; it being expressly provided, by 21 H. 8, c. 4, "that where part of the executors named in any such testament of any such person so making or declaring any such will of lands, &c., to be sold by his executors, do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors, and the residue of the executors, do accept and take upon them the cure and charge of the same testament and last will, then all bargains and sales of such lands, &c., so willed to be sold by the executors of any such testator, made by him or them only of the said executors that so doth accept,

will not take as trustee, gives the best evidence that he will not take as trustee;" and he ultimately decided that where

or that heretofore hath accepted and taken upon him or them any such cure or charge of administration of any such will and testament, shall be as good and as effectual in the law as if all the residue of the same executors named in the said testament, so refusing the administration of the same testament, had joined with him or them in the making of the bargain and sale of such lands, &c., so willed to be sold by the executors of any such testator which heretofore hath made or declared, or that hereafter shall make or declare any such will of any such lands, tenements, or other hereditaments, after his decease, to be sold by his executors." Where a man devises that his executors shall sell his land, the vendee is in, not by the executors but by the devisor. Co. Litt. 113, a.

In T. 13 R. 2, Fitz. Abr. Jointtenancy, pl. 9, a charter of feoffment was made to four, and after livery of seisin to three in the name of all, the fourth saw the deed, and said by parol that he would have nothing in the land, nor agree to the deed, but disagree. And after a special verdict in assize pending this matter, it was adjudged the writ brought by the three should abate, inasmuch as that this disagreement by word in pais could not divest the freehold out of him.

In Sheppard's Touchstone, 285, it is said, that "feoffments, gifts, grants, and leases, may be avoided by the disagreement of the party to whom they are made; and if it be a lease for years that is made, he may

waive and avoid that by word of mouth in the country, as well as a gift of goods or an obligation delivered to his use; (*sed vide* M. 7 E. 4, fo. 20, pl. 21;) but if it be an estate of freehold that is made by feoffment, it seems he cannot waive and avoid that but in a court of record."

One reason for requiring the disclaimer to be by matter of record or by some notorious act done which would be wrongful if the party meant to take to the estate, seems to have been, that if the estate could be divested in any other manner, the tenant to the præcipe could not be known, and estates lying in livery would be dealt with in the same secret manner as those lying in grant; an evil to which we are now rendered familiar by the unforeseen operation of the statute of uses, but which seems to be altogether abhorrent to the common law. This reason does not apply to things lying in grant; and perhaps with respect to them, a disclaimer by deed would at all times have been sufficient. In the principal case the assignment being of personalty, a disclaimer by parol would, according to Sheppard, have been sufficient to divest the estate.

An use might have been waived by parol before the Statute of Uses, 3 Co. Rep. 27. A trust estate may therefore be so waived by cestui que trust since the statute. As to the waiver of a copyhold by the devisee, *i. e.* by the cestui que use of the surrender appointed by the will of the surrenderor, see *Rex v. Sir T. M. Wilson*, post, vol. iv.

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one trustee releases with the intention to disclaim, the property vests in the other, the assenting trustee. Now these cases all proceed upon the same principle, namely, that where a conveyance is made to several trustees, it is not necessary that all of them should execute the deed or accept the trust, but that the property will vest in those who do execute or accept. Applying that principle to this case, as *Barr* and *Hudson* accepted the trust and the other trustees renounced it, the consequence is that the whole property vested in the former, the two assenting trustees. When the case was argued I entertained some doubt whether the deed would operate as a release of the debt owing to *Barr*, unless the intended trust property were actually delivered over to the trustees; but on consideration, I am satisfied that that raises no foundation upon which to build the conclusion that the deed is inoperative. *Barr* and *Hudson*, who executed the deed, have every thing which the deed stipulated to give them, if they chuse to take it. The release was given in consideration of the assignment, and is therefore an operative deed; and *Barr's* debt being thereby extinguished, it follows that the commission cannot be supported. For these reasons we are of opinion that the nonsuit was right, and that the rule for entering a verdict for the plaintiffs ought to be discharged.

#### Rule discharged (a).

(a) And see *Holmes v. Love and Tucker*, 5 D. & R. 56; 3 B. & C. 42; 1 Ry. & Moo. N. P. C. 138. There, the tenant of leasehold premises by deed assigned his interest to trustees for the benefit of his creditors, with a proviso, "that if all and every the creditors should *refuse* to execute or otherwise con-

sent to the deed, within six months from the date thereof, it should be void." Some of the creditors did not execute the deed, but there was no evidence of their refusing to do so. It was held, that such non-execution was not a refusal within the meaning of the proviso; and did not make the deed void.



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THIS was an action of debt for use and occupation, with the money counts, upon causes of action accruing after the bankruptcy (a). Plea, nil debet. At the trial before Gaselee, J. at the Berkshire Summer Assizes, 1828, the case was this. The commission under which *Garbet* was declared a bankrupt, issued on the 20th of February, 1827. He was at that time, and had for some years previous, been the mortgagor in possession of six houses in the neighbourhood of Reading in Berkshire. In 1823 and 1824, he mortgaged the houses to several persons. The defendant occupied one of the houses as tenant to *Garbet* under an agreement, and he also acted as agent for *Garbet*, in receiving the rents of the other houses, and applying the proceeds in liquidation of the interest due on the mortgages; and he had accounted with *Garbet* for his receipts and disbursements up to Christmas, 1826. The action was brought by the assignees of *Garbet* to recover from the defendant three quarters rent from Midsummer 1827, to Lady-day 1828, and also the amount of rents received by him from the other tenants since the bankruptcy, in the years 1827 and 1828. The tenancies of those tenants all commenced after the mortgages, but at a time when *Garbet* had the entire control of the premises. The defendant resisted these claims, partly upon the ground of payments made by him in 1827 and 1828 to the mortgagees on account of interest due to them, and partly on the ground of notices given to him by the mortgagees since the bankruptcy. It was proved that on the 22d of February, 1828, after the bankruptcy, the mortgagees gave notice to all the tenants that the interest was in arrear, requiring them to pay their rents to them in liquidation of the interest in

A mortgagee, after notice to a tenant holding under a demise by the mortgagor subsequent to the mortgage, is entitled to rent due at the time of the notice as well as that accruing due afterwards; and an agent having received such rents for the mortgagor after his bankruptcy, is entitled to hold them for the benefit of the mortgagee, against the assignees of the mortgagor.

(a) Strictly speaking, therefore, it was unnecessary for the plaintiffs to declare in their representative character.

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future, and threatening, in default of their so doing, to adopt legal proceedings for the recovery of the rents. There was rent in arrear at the date of these notices, and other rent afterwards accrued due, all of which the defendant had received, and had paid over to the mortgagees in liquidation of the interest, except his own rent and one other small sum, which were together but just sufficient to pay the next half year's interest, which would become due to the mortgagees in about three months after the action was commenced. It was contended on the part of the plaintiffs, first, that the defendant could not set up any of those payments in answer to their claim, because if the bankrupt, the mortgagor, had sued the tenants, they could not have pleaded *nil habuit in tenementis* against him or have questioned his right to recover the rent; secondly, that at all events, the mortgagor was entitled to the rent which accrued due *before* the notice served by the mortgagees; and, thirdly, that the defendant having received the rents as agent for the mortgagor, could not set up the claims of third persons against the claim of his principal in his own discharge. The learned Judge was of opinion that the defendant was justified in making all the payments to the mortgagees, as well those before as those after the notice, and was also entitled to retain the other money to meet the interest accruing due, and, therefore, that he had given a good answer to the action. His lordship, consequently, nonsuited the plaintiffs, but gave them permission to move to enter a verdict for such sum as the Court should direct.

*Russell*, Serjt., in Midsummer term last, having moved accordingly, and obtained a rule nisi,

*Talfourd* now shewed cause. If the tenants would have been entitled to pay their rents to the mortgagees, the defendant, who received the rents from the tenants as the agent of the mortgagees, was entitled to dispose of them in the same manner. Before the notice, he paid the mort-

gagees as agent of the mortgagor ; after the notice, he held the residue for the benefit of the mortgagees. Indeed the defendant's agency to *Garbet* must be considered as having been determined by his bankruptcy ; and from that time he must be regarded as receiving the rents of others, and retaining his own, as a stakeholder, for the parties entitled to them. The real question, therefore, is, whether a mortgagee has a legal right to stop the rent in the hands of a tenant before he has paid it over to a mortgagor in possession. Now, it was decided in *Moss v. Gallimore (a)*, that a mortgagee, after giving notice of the mortgage to the tenant in possession under a lease *prior* to the mortgage, is entitled to the rent in arrear at the time of the notice, as well as to that which accrues due afterwards, and may distrain for it after such notice. The only particular in which that case differs from the present is, that there the tenancies were created by the mortgagor *before* the mortgage, and here the tenancies were created *after* the mortgage ; but that circumstance does not affect the principle of the decision. It will be contended on the other side, that the defendant and the other tenants having come into possession under the mortgagor, cannot be allowed to dispute his title ; and *Alchorne v. Gomme (b)* will be relied on. But that case, even assuming it to have been rightly decided, is very distinguishable from, and cannot govern the present. There, a plea to an avowry for a distress for rent in arrear stated, that before the lessors had any thing in the premises, and before they, (claiming title under a pretended agreement between them and *A. B.*,) demised them to the lessee, *A. B.* had mortgaged them in fee to *C. D.* ; that the mortgage becoming absolute, and notice thereof being given to the lessee, and he having been required to attorn (c), did

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(a) Dougl. 279.

(b) 9 J. B. Moore, 130; 2 Bingham 54.

(c) To attorn, *attornare*, from the French *atourner*, is literally " to

substitute." This verb and its derivatives were formerly used to express every kind of substitution. They are now obsolete, except with reference to two species of



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attorn to *C. D.*, when he distrained for the rent, which the lessee paid him to prevent the goods from being sold under the distress; and that plea was held bad on special demurrer, as it amounted in substance merely to a plea of nil habuit in tenementis. The tenant there did not confine himself to shewing that his landlord had a defeasible title which had been defeated, but went the whole length of pleading that his landlord had no legal title; and the form of his plea, alleging as it did want of title, was immaterial. Besides, he did not allege an eviction by title paramount, but merely an attornment (*a*) at the request of a stranger, for there the party mortgaging was not the party who demised, but a stranger. It is quite a different case where the demise is by the mortgagor in possession; as between him and the tenant the mortgagor has a title, so long as the mortgagee pleases, though no longer; and there is no inconsistency in the tenant being allowed to shew that his landlord had a defeasible title which has been defeated. Properly speaking, the mortgagor cannot be called the tenant of the mortgagee at all; at most he is only tenant by sufferance, and he may be ejected, not only without a notice to quit, but without even a demand of possession, *Doe v. Maisey* (*b*); for the mortgagee may treat him as a trespasser whenever

substitution; the one is where a party appoints a person to act in his stead; that person is called his "attorney," being "atourné," i. e. substituted, for the principal. The other case in which this word is retained is, where one landlord is substituted for another. In this sense the words "attorn and attornment" originally embraced the whole series of acts necessary to vest the reversion in the new lord. These terms are now, however, used only with reference to the last act, the assent of the tenant to the substitution. When the assignee of the reversion came in by his

own act, he could not distrain or bring an action of waste before attornment. It was not, however, in the tenant's option to recognise the new lord or not, at his pleasure; he might be compelled to do so either absolutely or with a saving of his rights, by a writ of per quæ servitia, quem redditum reddit, or quid juris clamat; after judgment in either of which actions a distringas ad attornandum issued.

(*a*) *Vide post*, 197 (*b*).

(*b*) *Ante*, vol. iii. 107; 8 B. & C. 767.

he chuses to do so. A mortgagor in possession, stands rather in the situation of agent than of tenant to his mortgagee. His authority as such agent may be revoked at any time. So long as the authority of the mortgagor continues unrevoked, a payment of rent by a tenant to him is good; but the moment the principal recalls his authority, he is himself entitled to receive all rent not actually paid, both bygone and future. A mortgagor cannot make a lease to bind his mortgagee, *Keech v. Hall* (a), where it was held that a mortgagee might recover in ejectment, without giving notice to quit, against a tenant claiming under a lease from the mortgagor, granted after the mortgage, without the privity of the mortgagee. But the mortgagee may treat the mortgagor as his agent and adopt his act. He may treat the lessee as his own tenant, and thereby confirm the lease; and if he does so, and the tenant attorns (b) to him, he becomes the tenant of the mortgagee, and is bound to pay his rent to him. So here, from the moment the notices were given, the tenants became in fact the tenants of the mortgagees, the rents belonged to the mortgagees, and the defendant was justified in holding the money paid to him for their benefit.

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(a) Dougl. 21.

(b) The old books are wholly silent as to this species of attornment; and it would seem that as well before as since the statute of *Aene*, any attornment would, under such circumstances, have been altogether unnecessary and inoperative. No *distringas ad attornandum* ever issued to compel a tenant to attorn to a grant which had taken place while he was an entire stranger to the property. This process, indeed, only lay against the party who was tenant at the time of the assignment of the reversion; so that if the tenant had aliened before attornment, the per

quæ servitia, &c., must have been brought against the alienor, not against the alienee. But neither in the present case nor in *Alchorne v. Gamme*, did the conveyance give a new lord to the tenant, for at the period of the mortgage the tenancy did not exist. It is simply the case of a principal adopting the contract of a self-constituted agent, any act done under which he might have treated as a trespass; and that which is here called an attornment seems to be nothing more than an acquiescence, in the condonation of a trespass, by a party whose dissent would have been quite immaterial.

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*Curwood*, contra. The mortgagor was in the actual possession of the premises at the time when he demised them; therefore the persons who became his tenants under that demise cannot dispute his title at the time of the demise (a). *Moss v. Gallimore* (b) is distinguishable from the present case, because there the lease was prior to the mortgage. In *Keech v. Hall* (c), indeed, the lease was subsequent to the mortgage; but still that case only shews that the mortgagee may treat the mortgagor or his lessee as a trespasser if he chuses. He is not bound to treat the lessee of the mortgagor as a trespasser; he may adopt the act of the mortgagor and confirm his lease; and in that case the lessee becomes the tenant of the mortgagee, only from the time when the latter elects to make him so by giving him notice of the mortgage. In this case, therefore, the rents accruing due before the notice were of right payable to the mortgagor, and the defendant must be considered as having received them as his agent, and must account for them to his assignees. Then, as to the rents which accrued due after the notice, it is true the mortgagee might have brought ejectment and evicted the tenants, but he has not done so; therefore if the mortgagor had sued them for rent, they could only have pleaded want of title in him, which would

(a) So in *Balls v. Westwood*, 2 Campb. 11, where the defendant has come into possession under the plaintiff, he cannot resist the payment of rent on the ground that the title of the latter has expired, without shewing that he has disclaimed holding under the plaintiff, relinquished the possession, and re-entered under a new landlord. S.P. arguendo, Keilwey, 65. *Sed vide* Co. Litt. 41, b. note 237. And see Co. Litt. 55, b. notes 372, 373; *Smith v. Targett*, 2 Anstr. 529; *Johnson v. Atkinson*, 3 Anstr. 798.

It is now the established law that a tenant cannot deny that his lessor, at the time of the demise,

had some legal interest in the property. *England d. Sybourn v. Slade*, 4 T. R. 682; *Doe d. Jackson v. Ramsbotham*, 3 M. & S. 516; *Alchorne v. Gomme*, *ubi suprâ*. Formerly the rule seems to have been confined to leases by indenture. The law is expressly so laid down in Litt. sect. 58; Co. Litt. 47 b.; Anon. Dyer, 122 b. *Vide tamen* It. Darb. 4 E. 3, Fitz. Abr. Brief 747, where, in waste, the under-lessee for years was ousted from denying the title of the lessor paramount.

(b) Dougl. 279.

(c) Ibid. 22.

have been a bad plea, and no answer to the action. *Alchorne v. Gomme* (a).

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BAYLEY, J.—It is quite clear, in point of law, that a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may be treated by the mortgagee either as trespasser or as tenant, at his option. If the mortgagee does not interfere at all, but suffers the mortgagor to continue in possession and receive the rents, such a tenant may consider the mortgagor as his landlord; and a payment of rent to him, under those circumstances, will be a valid payment. But if the mortgagee gives notice of the mortgage to the tenant, the latter ceases to be the tenant of the mortgagor and becomes the tenant of the mortgagee, who is then entitled to demand and receive payment of the rent to himself. It is certainly an ancient and well established rule of law, that a lessee cannot dispute the title of his lessor at the time when the lease was made; but still he is at full liberty to prove that his lessor's title has been defeated or determined. There is also another rule of law, namely, that a mortgagor cannot dispute the title of his mortgagee. Where the mortgagor occupies the premises, he holds by permission of the mortgagee, who may terminate his rights whenever he pleases. *Keech v. Hall* (b) is decisive to shew that where a lease has been granted by a mortgagor *after* the mortgage, and the mortgagee has permitted the mortgagor to continue in possession, although the lessee is not allowed to say that the mortgagor never had any title, he is at liberty to shew that he had a defeasible title, and that such title has been defeated, or, in other words, that he had such a title only as a mortgagor can have. It is quite clear that the mortgagor in the present case might have brought an ejectment against the tenant of the mortgagee, and have evicted him, and that such eviction by title paramount would have been a good answer to an action for the rent brought by the mort-

(a) 2 Bingham, 54; 9 J. B. Moore, 130.

(t) Douglass, 22.

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gagor; from which I think it follows that the mortgagee was not bound to go through the form of bringing an ejectment, if the tenants were willing to attorn and to pay their rents to him: it was enough for him to do any act which determined the title of the mortgagor. Here the mortgagee did such an act, for he gave notice of the mortgage to the tenants, and desired them to pay the rents to his agent, which at once destroyed the right of the mortgagor to receive the rents. By the common law, the attornment of the tenant was necessary to entitle the mortgagee to the rent; but by the statute 4 *Anne*, c. 16. s. 10. attornment is rendered unnecessary, and the tenant, upon receiving notice of the mortgage, is placed in the same situation as if he had attorned to the mortgagee, with this proviso, s. 11, that he shall not be prejudiced by payment of rent to the grantor, until notice of the mortgage has been given to him by the grantee (a). Now the attornment by the common law would have had relation back to the time of the mortgage, therefore, it follows, that all rent due from the tenant, and not actually paid to the mortgagor, belongs of right to the mortgagee. In this case, the defendant claims a right to retain for the use of the mortgagees, all the rents due from the tenants, and unpaid to the mortgagor, at the time when they received notice of the mortgage, and all the rents which accrued due afterwards, and I think his claim is well founded; for as the tenants as soon as they had received notice of the mortgage were bound by law to pay to the mortgagees all the rent not actually paid to the mortgagor, I think the defendant is entitled to retain all the rents received by him, both those in respect of which he made payments to the mortgagees, and those which he holds to meet the amount of interest which will next become due. He holds those sums for the persons who are by law entitled to them; and those persons are the mortgagees. I am, therefore, of opinion that the plaintiffs are not entitled to recover, and that the nonsuit was right.

(a) And see 11 *Geo.* 2, c. 19, s. 11, 1 *Chitty's Statutes*, 54.

LITLEDALE, J.—I am of the same opinion. *Moss v. Gallimore* (a) is not strictly applicable to the present case, because there the tenant held under a lease made prior to the mortgage. Here the tenants held under demises made subsequent to the mortgage, and, therefore, we must consider how the law is, where the lease under which a tenant holds has been granted by the mortgagor subsequently to the mortgage. A mortgagor in possession is not a tenant at will; and strictly speaking, he is not even a tenant by sufferance: the relation existing between him and the mortgagee is one of a very peculiar nature. By the execution of the mortgage the mortgagee becomes the legal owner of the premises, and entitled either to immediate possession, or to the rents and profits. A lease granted by the mortgagor, after the mortgage, is void as against the mortgagee. In *Keech v. Hall* (b), Lord Mansfield said, "When the mortgage is left in possession, the true inference to be drawn is an agreement that he shall possess the premises at will in the strictest sense; and, therefore, no notice is ever given him to quit, and he is not even entitled to reap the crop, as other tenants at will are, because all is liable to the debt, on payment of which (c) the mortgagee's title ceases. The mortgagor has no power, express or implied, to let leases not subject to every circumstance of the mortgage." The mortgagor, therefore, has no authority to do any act without the consent of the mortgagee; and though the mortgagee may permit the mortgagor to receive the rents for a time, he may, whenever he chuses, give notice to the tenants not to pay them to the mortgagor; and when he does so, he thereby determines the authority of the mortgagor to receive them, and a tenant who afterwards pays rent to the mortgagor does so at his peril. It is admitted that this may be the law as regards future rents, but it is insisted that it does not apply to by-

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(a) Dougl. 379.

(b) Ibid. 22.

(c) i. e. on the appointed day of

payment, after which the estate belongs at law absolutely to the mortgagee. *Vide ante*, iii. 108.

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gone rents. I have no doubt that the principle is equally applicable to both. The mortgagee, indeed, can neither distrain nor sue for those rents which accrued due before he gave the tenants notice of the mortgage, because till then there was no privity between himself and the tenants (a). But since the statute of *Anne*, the notice to the tenants operates as an attornment by them (b), and constitutes them the tenants of the mortgagee; and at common law that attornment would have related back to the date of the mortgage, so as to entitle the mortgagee to all the rents from the time of the execution of the deed. Strictly speaking, every person who comes in under a mortgagor is a trespasser. Ejectment may be brought against the tenants of the mortgagor upon the demise of the mortgagee, and the accruing rents, being in the nature of mesne profits, may be recovered by the mortgagee from the day when he gave the tenants notice of the mortgage (c). Then if the mortgagee might maintain ejectment, and afterwards recover the accruing rents in an action for mesne profits, it is quite clear in point of law, that he may claim to have the rents paid over to him without bringing any action at all. In this case, the defendant had received the rents from the tenants, but had not paid them over to the mortgagor when the mortgagee served him and the tenants with notice of the mortgage. The rents which the defendant had paid over to the mortgagor before the notice, the mortgagee is not entitled to receive, because he suffered the mortgagor to continue in possession

(a) If I suffer *A.* to receive my rents from *B.*, whether *A.* be my vendor, mortgagor or steward, or a mere stranger, payments made to *A.* by *B.* before *B.* has notice of the determination of the authority, are payments to me. Any payment made after notice, whether of by-gone or of accruing rents, would be wholly nugatory as against me.

(b) *i.e.* where the tenancies are

prior to the mortgage. *Vide ante*, 197 (b).

(c) And as the demise might be carried back to the day on which the right of entry for non-payment at the stipulated time accrued, the mesne profits would consist of the whole profits during the existence of the mortgage title minus the amount of payments made to or authorised by the mortgagee.

and to receive those rents; but the rents not actually paid over, he is entitled to receive, and might recover *quà mesne profits*; for as to those he has a right to say, "you, the tenant, are not justified in paying rent to the mortgagor, and you, the mortgagor, are not justified in receiving it from the tenant." Then as to the accruing rents, the notice to the tenants to pay their rent to the mortgagee, served upon them before those rents became due, was in this case equivalent to an eviction of them by title paramount, and would be a good answer to any action for the rent brought against them by the mortgagor. For these reasons, I am of opinion that the notices of the mortgage given to the tenants by the mortgagees entitled them to receive both the bygone and the future rents, and, therefore, that this action is not maintainable.

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PARKE, J.—I concur in the opinion that this rule must be discharged, and the nonsuit allowed to stand. The question for our consideration is, whether the plaintiffs are entitled to recover certain rents, some due before, and others after the notices given by the mortgagees; the defendant either having received from others, or being personally liable to pay such rents to some person. His defence, it is said, amounts to a plea of *nil habuit in tenementis*, which is no answer to the action, either as regards the house of which he himself is tenant or those held by the other tenants. Now it is quite true that a plea of *nil habuit in tenementis* is no answer to an action by a landlord against his tenant; but an eviction by title paramount is a good plea to such an action in respect of rent accruing due since the eviction; and I think the notice of the mortgage given, and the demand of rent made, by the mortgagees in this case, is equivalent to an eviction by title paramount. There are two reported cases very similar to the present; *Sapsford v. Fletcher* (a), and *Taylor v. Zamira* (b). In the first of those cases it was held, that it was a good plea to an avowry

(a) 4 T. R. 511.

(b) 6 Taunt. 524; 2 Marsh. 220.



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for rent; that before the rent was due the original landlord *threatened* to distrain for ground rent due from the lessor, and that the sub-tenant paid it to save his own goods, the payment under threat being considered a payment by compulsion, though no distress was in fact made. In the second case I have referred to, it was held, that to an avowry for rent, the plaintiff in replevin might plead payment of an annuity secured out of the lands demised previously to the demise to him, for the arrears of which the grantee had threatened to distrain. In that case, *Gibbs*, C. J. seems to have considered what took place as equivalent to an eviction. He said, "In every plea of eviction there is an averment that the lessor had not a perfect title when he demised; but that fact alone will not suffice; to constitute a plea, to it must be added the fact, that the lessee was in consequence *evicted*; the whole is a defence. The plaintiff's counsel argues that, because *nil habuit in tenementis* alone is not a defence, therefore it cannot be part of any other defence. The question is, whether the fact that the tenant was called on by the annuitant, under a threat of distress to pay off the arrears of the annuity, and did pay them off accordingly, being added to the other fact of the lessor's defect of title, be not a good plea;" and the Court decided that it was a good plea. So here, the fact that the tenants were called on by the mortgagees to pay their rents to them in liquidation of the interest of the mortgage, under a threat that legal proceedings would otherwise be adopted, and that they did pay accordingly, coupled with the other fact of the mortgagor's defect of title, would be in my opinion a good plea to an action by the mortgagor for such rents as tenants were bound so to apply; though the mere fact of the mortgagees' being entitled to the possession clearly would not. Now the tenants were bound so to apply all the rents in arrear at the time of the notices, as well as those due afterwards, as long as there was interest due upon the mortgages; for if the mortgagees had brought first ejectments against them,

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and afterwards actions for mesne profits, they must unquestionably have recovered those rents; and it is not necessary in point of law, and would indeed be contrary to the policy of the law, as injurious to the interests both of mortgagee and tenant, that the one should be compelled to pursue such dilatory and expensive measures, where the other is willing to pay without any delay or expense. But there is another complete answer to this action arising out of the peculiar relative situation of mortgagor and mortgagee. Lord *Mansfield* pointed this out in *Moss v. Gallimore* (a), when he said, "A mortgagor is not, strictly speaking, a tenant at will to the mortgagee, for he is not to pay him rent. He is so only quodammodo. Nothing is more apt to confound than a simile. He is *like* a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee; but the mortgagee may put an end to this agreement when he pleases." A mortgagor may be considered as filling the character of agent to his mortgagee. He is entitled to receive the rent so long as the mortgagee does not interfere to prevent him; and so long he may recover upon a contract entered into by himself and in his own name with a tenant. But as soon as the mortgagee interferes, and, by giving notice to the tenant to pay the rent to himself, determines the agency of the mortgagor, the latter loses his right to receive and recover any rent not actually paid, whether previously due or not. Here the agency of the mortgagor has been determined by the notice, and on that ground I am of opinion that this action, which must be considered in effect as brought by the mortgagor, cannot be sustained. The case of *Alchorne v. Gomme* (b), which has been cited, is certainly an authority the other way. But the question there was not between mortgagor and mortgagee. Nor did the pleadings there properly raise the question under consideration here; and the form of them seems to have drawn the attention of the

(a) Dougl. 279.

(b) 2 Bingh. 54; 2 J. B. Moore, 130.

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Court chiefly to the consideration of the effect of the alleged attornment of the tenant to the mortgagee, which is in my view of it wholly immaterial in the present case, because the notice given by the mortgagees here was sufficient to determine the authority of the mortgagor, and to entitle the mortgagees to receive the rents, whether there was any attornment by the tenants or not. I am, therefore, of opinion, that the mortgagor had not, and that the plaintiffs, his assignees, have not any right to the unpaid rents, at least till the interest of the mortgage is paid off<sup>(a)</sup>, and that the defendant, the tenant, has a right to retain the rent accruing due to meet the interest accruing due; and, consequently, that the plaintiffs cannot maintain this action.

Rule discharged.

(a) The mortgagees would continue to be the legal owners until reconveyance, which reconveyance would have no retrospective operation. After the principal and interest due on the mortgage had been satisfied, the tenants would however, no doubt, be protected in equity in paying the rents to the mortgagor.

SPARROW, PECKOVER, and others, v. CHISMAN.

Where a party accepts bills drawn by one partner in a firm, for his private accommodation, upon the understanding that the drawer will provide for the bills when due, no action on the bills lies against the acceptor, either by the drawer alone, or by his firm jointly.

**ASSUMPSIT** by plaintiffs, as indorsees, against defendant, as acceptor of two bills of exchange for 1500*l.* each, drawn by plaintiff *Peckover*, with the usual money counts. Plea, non assumpsit, and issue thereon. At the trial before *Garrow*, B., at the Essex Summer Assizes, 1828, the case was this. The plaintiffs were bankers at Chelmsford, and brought this action against the defendant to recover the sum of 3000*l.*, the amount of two bills of exchange drawn by the plaintiff *Peckover*, upon and accepted by the defendant. After a *prima facie* case proved on the part of the plaintiffs, the answer set up was, that the defendant had not received from the plaintiff *Peckover* any valuable consideration for the bills. In support of this case the following facts were proved. *Peckover* and the defendant

had for some years had private transactions together, and *Peckover* had advanced a sum of 4000*l.* to the defendant, as the share of capital of *Peckover*'s son, who was about to enter into partnership with the defendant. Some time after this advance, *Peckover* applied to the defendant, requesting him to accept the bills in question, which the defendant, after some hesitation, consented to do. *Peckover* then gave the defendant the following memorandum in writing, signed by himself:—"I hereby hold myself responsible to you for the due payment of your acceptances for 3000*l.*, and I also engage to leave in your hands 4000*l.*, which is placed with you as my son's share of capital in your house, in the event of his becoming a partner." It was upon this evidence contended, on the part of the defendant, that the defendant having received no valuable consideration for the bills, *Peckover* could not sue him upon them alone, and consequently could not sue him upon them jointly with his partners, the other plaintiffs; and therefore that the plaintiffs must be nonsuited. The learned Judge declined to nonsuit, and left it to the jury to say whether, under all the circumstances, they thought that *Peckover* had given a valuable consideration for the bills; directing them, if they were of that opinion, to find a verdict for the plaintiffs. The jury found a verdict for the plaintiffs.

*Spankie*, Serjt., in Michaelmas term last, moved for a new trial. He contended that *Peckover*, not having given any valuable consideration for the bills, as it was clear upon the evidence he had not, and being therefore incompetent to maintain an action upon them, in his own name alone, against the defendant, was equally incompetent to maintain such an action jointly with others his partners; and he cited *Jacaud v. French*(*a*), and *Richmond v. Heapy*(*b*), as authorities in point.

(*a*) 12 East, 317.

(*b*) 1 Stark. N. P. C. 204.

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*Gurney and Brodrick* now shewed cause. The case was properly left to the jury, and there is no ground for disturbing the verdict, for the jury were perfectly warranted in finding upon the evidence before them, that the defendant accepted the bills for a valuable consideration, namely, *Peckover* leaving in his hands the 4000*l.* which he had previously advanced him.

*Spankie*, Serjt., and *Chitty*, contrà, were stopped by the Court.

BAYLEY, J.—*Peckover* undertook to provide for the bills when they became due. That was the arrangement made between him and the defendant. By that arrangement he precluded himself from suing the defendant upon the bills; and if he could not have sued alone, how can he sue jointly with other persons? The other plaintiffs are his partners, and are bound by his acts, therefore they cannot recover through him. The rule for a new trial must be made absolute.

LITLEDALE, J., and PARKE, J., concurred.

Rule absolute.

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POULTON v. LATTIMORE.

*A.* sold to *B.* saintfoin seed, warranted to be "good new growing seed." Soon after delivery, *B.* was told that the seed was not good new growing seed, but he nevertheless sowed part, and sold the rest, without giving any notice of the defect to *A.*; *A.* cannot recover the price if the seed did not correspond with the warranty.

**ASSUMPSIT** for goods sold and delivered. Plea, non assumpsit, and issue thereon. At the trial before *Garrow*, B. at the Herts Summer Assizes, 1828, (a) the case was this: The action was brought to recover the value of a quantity of saintfoin seed sold by the plaintiff to the defendant, at

(a) Counsel for the plaintiff, defendant, *Andrews*, Serjt., and *Brodrick* and *Ryland*; for the *Price*.

the price of 60s. per quarter, and warranted to be "good new growing seed." The defence was, that the seed was not equal to the warranty. One of the witnesses for the defendant stated, that soon after the purchase of the seed from the plaintiff he had examined and tasted it, and that the taste proved that it was not good new growing seed. The taste was, in that witness's opinion, the best criterion of the quality. The defendant did not complain of the seed to the plaintiff, nor offer to return it; but he sowed part, which was proved to produce a very inferior crop, and he sold the rest, without any warranty, to different persons, some of whom had paid, and others of whom had refused to pay for what they bought, and all of whom stated that the seed was a total failure, and worth nothing. It was contended on the part of the plaintiff, that as the defendant had not complained of the seed, nor offered to return it, but on the contrary had sown part himself, and sold the remainder to persons by whom that also was sown, he had adopted the contract, and made the seed his own; that he could not be allowed to adopt the contract on the one hand by keeping the seed, and to repudiate it on the other by refusing to pay the price; but that having adopted the contract in part by keeping and using the seed, he was bound to adopt it in toto by paying the price; and consequently that he could not set up the breach of the warranty as a defence to this action, though that breach might form the foundation of a cross action against the plaintiff. The learned Judge received the defendant's evidence, but gave the plaintiff permission, in case the jury should find a verdict against him, to move to enter a verdict in his favour, if the Court should be of opinion that the breach of warranty was no defence to the action; and his lordship directed the jury to find a verdict for the defendant, if they were of opinion, upon the evidence, that the seed was inferior to the warranty. The jury found a verdict for the defendant.

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*Brodrick*, in Michaelmas term last, moved accordingly. He contended that if the seed was of any value at all, the fact of its not being equal to the warranty constituted no defence to an action for the stipulated price, because the remedy of the defendant, if that fact was true, was by an action against the plaintiff for a breach of the warranty; and if he intended to rely on the inferiority of the seed as relieving him from the contract, he was bound to have returned it, and thus rescinded the contract. Upon this point he claimed a right to enter a verdict for the plaintiff for the full price of the seed. He further contended, that the case should not have been left to the jury in the terms used by the learned Judge, which were, to find for the defendant if they thought the seed inferior to the warranty; for if the quality of the seed was matter of defence at all in an action for the price, it could only be so proportionably, viz. it might go to reduce the damages in the same proportion as the quality was below the warranty; but that it could not entitle the defendant to a verdict, unless it was proved that the seed was worth nothing, which could not be the case, as the defendant had sold some of it, and received the money for it. Upon this point he claimed, at all events, the benefit of a new trial.

The Court granted a rule nisi in the alternative, either to enter a verdict for the plaintiff, or for a new trial; against which,

*Andrews*, Serjt., (*Price* was with him,) now shewed cause. There was an express warranty of the seed by the seller as "good new growing seed," therefore the buyer was entitled to prove the inferiority of the seed to the warranty in mitigation of damages, although he did not rescind the contract by returning the seed. Where goods are sold by sample, at a specific price, but without any warranty, and the goods delivered do not correspond with the sample, the buyer may return the goods or give notice to the seller to fetch them back, and may thus rescind the contract in

toto. In such a case if the buyer keeps the goods he must pay for them; he cannot adopt the contract in part by keeping the goods, and repudiate it in part by refusing to pay for them; he must either adopt the contract at once and in toto, or at once and in toto rescind it. Where goods are sold with a warranty the case is different. If the seller expressly warrants the goods to be of a specific quality, and brings an action for the value of them, the buyer, in answer to that action, may prove the breach of the warranty in reduction of the damages, although he agreed to purchase them at a specific price, and although he has not rescinded the contract in toto by returning the goods. The very nature of the contract of warranty renders it necessary that the buyer should be entitled to keep the goods, for the purpose of ascertaining their quality and value; especially in a case like the present, where, from the very nature of the goods, their real quality and value could not be ascertained for a considerable time, namely, until the seed had been sown and the crop gathered. In such a case, therefore, the buyer may either rescind the contract altogether, by returning the goods promptly and in an unaltered state, and refusing to pay for them, or he may recover the price if it has been paid, or he may keep the goods, and recover the difference between their real value and their value as warranted. Then if that be so, it is by analogy no more than reasonable, that when the seller of the goods brings an action for the price, the buyer should be at liberty to prove that they are inferior to the warranty. The evidence tendered by the defendant was, therefore, properly received in the present case. Secondly, the case was properly left to the jury, for the terms in which it was left to them included the question, whether the seed was of any value or not. It was warranted to be "good new growing seed;" the jury found that it was not what it was warranted to be, therefore they found that it was of no value, for grass seed which will not grow is of no value. The using such seed, for the purpose of ascer-

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taining whether it will grow or not, is not only no benefit, but a positive injury to the person using it, because he loses the beneficial occupation of the land during the growing season, and the land itself is injured by the use of bad seed. Besides, this point was not made at the trial; the plaintiff did not put his case upon the quantum valebat, but claimed the full stipulated price of the seed; and if he had gone upon the quantum valebat, the answer would have been then what it is now, that the defendant gave some evidence that the seed was worth nothing, and that it was for the plaintiff to shew clearly that it was worth something, and how much it was worth. In either view of the case, therefore, there is no ground for disturbing this verdict.

*Brodrick and Ryland*, contra. According to the defendant's own evidence he knew that the seed was bad before he had sown it, or in any way disposed of it; therefore the argument that he was entitled to keep it and use it for the purpose of ascertaining its quality, falls entirely to the ground. As soon as he had discovered a breach of the warranty, he was bound either to return the seed or to call upon the plaintiff to take it back, and that while it was in an unaltered state, and while its value could be ascertained by the plaintiff. The buyer, in such a case, is not allowed to lie by, taking his chance of the bargain proving advantageous to himself, and yet reserving the right to avoid the contract if he afterwards finds it his interest to do so. *Grimaldi v. White (a)* is in point. It was there held, that if a party purchase an article at a certain price, pursuant to a specimen exhibited, and on delivery it is found to be of inferior performance, the buyer cannot, in an action for goods sold, set up the inferiority to the specimen; he should have returned it, and so have rescinded the contract. *Lawrence, J.*, there said, "If the defendant meant to have availed himself of this objection, he should

(a) 4 Esp. N.P.C. 95.

have returned the article. He must rescind the contract totally. Having received it under a specific contract, he must either abide by it or rescind it in toto, by returning the thing sold; but he cannot keep the article received under such a specific contract, and for a certain price, and pay for it at a less price than that charged by the contract." In that case, therefore, the defence was held inadmissible, even for the purpose of reducing the damages. In *Fisher v. Samuda* (a) it was held, that as soon as goods are discovered not to answer the order given, they should be sent back, or notice given to the vendor to take them back, or an action cannot be maintained on the ground of the unfitness of the article. It is not necessary in the present case to contend for that decision in its full extent; the argument here is only that the defendant ought to be left to his remedy by a cross action. In *Groning v. Mendham* (b) the action was brought for the price of clover seed sold by sample, and the defence was that the seed did not agree with the sample. Lord *Ellenborough* held, that before the defendant could be allowed to enter upon such a defence, he must prove that he had given the seller notice of his objection, and had offered to return the seed. The same rule has been laid down in a case where there was an express warranty; *Hopkins v. Appleby* (c). There the action was for goods sold and delivered. The defendants, who were soap makers, had purchased of the plaintiff eight sarrands of Spanish barilla, warranted to be of the best quality. Immediately upon the delivery of the barilla, the defendants mixed the contents of the sarrands together, and proceeded to use the barilla in the manufacture of soap. It was found upon trial that the barilla was of so inferior a quality, that nearly double the usual quantity was required in order to complete the process of soap making. The defendants, however, continued to use it without making any complaint, until the whole had been consumed in eight successive boilings. The defence was, that the barilla was

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(a) 1 Camp. 190. (b) 1 Stark. N. P. C. 257. (c) Ibid. 477.

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not of the quality stipulated for, and the defendants paid into Court as much as they contended it was really worth; and it was insisted that, as the article was warranted, the defendants were not bound to return it upon discovering the breach of the warranty, or even to give the seller notice of the defect. Lord *Ellenborough* ruled, that as the buyers had not given the seller notice of any defect in the article, and had deprived him of the means of proving the value of the article by proper testimony, the buyers could not set up the alleged defect in the article as a defence to the action for the price. That case is directly in point with the present. So, in a very recent case, upon a contract to supply a chandelier sufficient to light a room of given dimensions, which the buyer kept and used for six months and then returned, it was held that he was bound to pay for it, though not according to the contract; *Milner v. Tucker* (a). All these are authorities to shew that the plaintiff in this case is entitled to a verdict for the full amount of the price of the seed. But, secondly, at all events he is entitled to a new trial, because, if the seed was of any value at all, the defendant was bound to pay so much as it was worth. Part of it was sown and grew, and part of it was sold by the defendant, who received the money for it. It must, therefore, have been of some value, and at least it should have been left to the jury to say whether it was of any value or not.

BAYLEY, J.—Upon the first point I am of opinion that it was competent to the defendant, in answer to an action for the price of the seed, to shew that the seed did not correspond with the warranty. The seed was expressly warranted to be “good new growing seed.” There was evidence to shew, and the jury acting upon that evidence have found, that it was not “good new growing seed.” It appeared, however, that, shortly after the sale, the seed was inspected and tasted by a competent judge, who told

(a) 1 Car. & P. N. P. C. 15.

the defendant that it was not "good new growing seed." The defendant did not upon that give notice to the plaintiff that the seed did not answer the warranty, or offer to return it, but proceeded to sow some of it, and to sell the rest. It has been insisted that he was bound, upon receiving such information, either to have returned the seed to the plaintiff, or to have given him notice of its inferiority to the warranty. But as the plaintiff had expressly warranted the seed, it seems to me that the defendant was at liberty, without returning it, to shew that it did not correspond with the warranty. He was not bound to trust, at once and implicitly, to the judgment of the person who tasted the seed, and to return it immediately as bad seed; he had a right to try the seed by sowing it. The taste of the seed could scarcely be the best criterion of its quality; and probably no experiment short of sowing it could satisfactorily determine whether it would ultimately produce a crop or not. Considering the nature of the article itself, and of the contract of warranty, I think the defendant was not bound to return the seed without using it; and that, by keeping and using it, he has not precluded himself either from maintaining an action for the breach of the warranty, or from setting up that breach in defence of this action. Then it has been urged, upon the second point, that although the warranty may not have been complied with, still as the defendant used part, and disposed of the residue of the seed, it must have been of some value to him, and therefore that the plaintiff was entitled to recover some damages. But I cannot see, upon the learned Judge's report, any evidence that could have been left to the jury, as shewing that the seed was of any value to any of the parties who sowed it; and besides, no such point appears to have been made at the trial: the only question between the parties there seems to have been, whether or not the seed corresponded with the warranty. The learned Judge was not desired to leave the other question to the jury; and if he had done so, I cannot help thinking it most pro-

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bable that they would have come to the conclusion, that the seed was worth nothing. I am, therefore, of opinion that this rule must be discharged.

LITLEDALE, J.—I am of the same opinion. I think it was competent to the defendant, in answer to this action brought to recover the price or value of the seed, to shew that it did not answer the warranty which the plaintiff had given of it. It is said that a buyer cannot set up such an answer to an action for goods sold and delivered, without previously either returning the goods to the seller, or giving him notice that they are defective in quality. I cannot subscribe to that doctrine. I am of opinion that where goods are warranted, the buyer is entitled, without either returning them to the seller, or giving him notice that they are defective in quality, to maintain an action for the breach of warranty; or, if an action is brought against him by the seller for the price, to prove the breach of warranty, either in reduction of damages, or in answer to the action, if the goods are of no value. *Fielder v. Starkie (a)* is a direct authority for the first branch of this proposition. There a horse was sold, warranted sound, and was proved to have been unsound at the time of the sale. The buyer discovered the unsoundness soon after the sale, but kept the horse three months after the discovery. It was held that the seller was liable to an action on the warranty, without either the horse being returned or notice given of the unsoundness, on the ground that there had been a breach of the contract on the part of the seller. Lord *Loughborough* said, “Where there is an express warranty, the warrantor undertakes that it is true at the time of making it. If a horse, which is warranted sound at the time of the sale, be proved to have been at that time unsound, it is not necessary that he should be returned to the seller. No length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be

(a) 1 H. Bla. 17.

given, though the not giving notice will be a strong presumption against the buyer, that the horse, at the time of the sale, had not the defect complained of, and will make the proof on his part much more difficult. The bargain is complete, and if it be fraudulent on the part of the seller, he will be liable to the buyer in damages, without either a return or notice." Now that being so, it appears to me reasonable and just, and in unison with every principle of law, which is founded on reason and justice, that where the seller brings an action for the price or value of the goods, the buyer should be at liberty to shew the breach of the warranty in answer to that action. Then the only question in this case is, whether the seller was entitled to recover any thing. Cases may occur where the buyer may retain goods, which, though not corresponding with the warranty, may yet be of some value, and which value, therefore, the seller may be entitled to recover. For instance, if one hundred bushels of seed had been sold, warranted good, and ten had turned out bad, the seller would be entitled to recover the value of the ninety. In this case the question is, was the seed worth any thing, and, if it was, should the question of its value have been left to the jury. The learned Judge was not requested to leave that question to the jury; and if he had been, and had complied with the request, it seems to me the jury could only have found that the seed was of no value whatever.

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PARKE, J.—I agree with the rest of the Court that there ought to be no new trial in this case. The plaintiff might have shaped his case in either of two ways. He might have claimed to recover the price stipulated in the contract made between himself and the defendant; but then he could not have recovered that price without shewing that the seed corresponded with the warranty: and if he had attempted to shew that the seed corresponded with the warranty, the defendant would clearly have been entitled

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to adduce evidence to negative that fact. On the other hand, instead of proceeding upon the contract, the plaintiff might have claimed to recover upon the quantum valebat whatever the seed was really worth, and might have proved by parol the actual value of the seed; and in answer to that case, the defendant would have been at liberty to prove, by means of the contract, that he bought the seed as and for good growing seed, for the purpose of sowing, and that it was not good growing seed, and therefore was of little or no value to him. But it is said there was evidence to shew that the seed must have been of some value, and therefore, that the plaintiff was entitled to a verdict for something, or at least that the question of value or no value should have been left to the jury. I am not satisfied that the plaintiff's case was presented to the learned judge in such a shape as to raise that question. It does not appear upon the learned judge's notes that any such point was made at the trial; and if the jury had been directed to find for the plaintiff if they believed the seed to be of any value, I think that, upon the evidence now before us, they would in all probability have found for the defendant.

Rule discharged.

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DOE, on the demise of COURTAIL, v. THOMAS.

**EJECTMENT.** At the trial before *Gaselee, J.*, at the Herefordshire Summer Assizes, 1828, the case was this:—  
 The cancellation of a lease is not a surrender by operation of law.

The fact of a lease being found in the possession of the lessor in a cancelled state, is no evidence of a surrender by deed or note in writing.

In ejectment by the lessee against the tenant in possession, the attorney of the lessor is bound to produce the lease, it having been deposited with him by order of a court of equity for the inspection of the lessee.

An estate was settled on *A.* for life, with power to charge it with an annuity for her husband, and portions for their younger children, and to grant leases. *A.* granted the estate to trustees for 500 years, on trust, if she should so direct, to raise portions by mortgage or sale. Held, that the term, till called into operation, was subservient to the leasing power, and was no answer to an ejectment by a lessee holding under a lease granted subsequently to the settlement.

The lessor of the plaintiff claimed under a lease alleged to have been granted to him on the 18th of February, 1825, by the honourable *William Booth Grey* and *Frances Ann*, his wife. Mr. *Grey*'s attorney, who had possession of the lease, being called on the part of the plaintiff to produce it, stated on the voir dire that he had received the lease from Mr. *Grey*, and still held it, in the character of his attorney. Upon that ground he objected to produce the lease, and the learned judge was of opinion that he was not bound to produce it. The plaintiff's counsel then put in the proceedings in a chancery suit between *Courtail* and the defendant and Mr. *Grey*, from which it appeared that the defendant held under a demise from Mr. *Grey* made subsequently to the lease; and also an order made in that suit by the Vice Chancellor on the 24th of April, 1828, by which the defendant and Mr. *Grey* were ordered to produce the lease and counterpart for the inspection of *Courtail*. Upon this evidence the learned judge ordered the lease to be produced, when it appeared that the names of the parties had been torn off, though the lease was proved to have been at one time in the possession of *Courtail* in a perfect condition. It was thereupon contended, on the part of the defendant, that the lease being produced in a cancelled state must *primâ facie* be presumed to have been surrendered, and that it lay upon the lessor of the plaintiff to give evidence to rebut that presumption. The learned judge was of opinion that the lessor of the plaintiff having proved that the lease was once in his possession in a perfect state, had made out a sufficient *primâ facie* case, and that it lay upon the defendant to shew that it had been surrendered, either by a note in writing, or by operation of law. The defendant then proved the following case in answer. Mr. *Pryce*, the father of Mrs. *Grey*, being seised in fee of the premises in question, by will dated 10th July, 1788, devised all his freehold and copyhold manors, messuages, &c., to trustees; in trust when *Elizabeth* his youngest daughter should attain twenty-one, to convey the same to the use of his eldest

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daughter *Frances Ann* for life, with power to her to charge the estate with an annuity of 400*l.* for her husband, and 5000*l.* for their child or children; and with power to the trustees, or the daughters when of age, to grant leases for twenty-one years. *Elizabeth* became twenty-one on the 17th of March, 1802; and by lease and release of the 17th and 18th of that month the trustees conveyed the estate to *Frances Ann* for life. On the 19th of the same month by marriage settlement made between *Henry* earl of *Stamford* of the first part, *W. B. Grey* his second son of the second part, *Frances Ann Pryce*, afterwards *Grey*, of the third part, and *G. H. Grey*, eldest son of the said earl and *W. Digby* of the fourth part, *Mrs. Grey* charged the estates with an annuity of 400*l.* for her husband, and 5000*l.* for younger children. The indenture then witnessed, "that in further pursuancè of the powers aforesaid, and for the consideration thereinbefore expressed, she, *Frances Ann Pryce*, did grant, bargain, sell, demise, limit and appoint unto the said *G. H. Grey* and *W. Digby*, their executors &c., all and singular the said manors, messuages &c., given and devised by the said thereinbefore recited will, and by the now stating deed charged and made liable as aforesaid, to hold the same with their appurtenances, but subject and without prejudice to the said rent charge of 400*l.*, unto the said *G. H. Grey* and *W. Digby*, their executors &c., for the term of 500 years from thenceforth next ensuing; upon trust, that if there should be one or more child or children of the said intended marriage, other than and except an eldest or only son, then that they *G. H. Grey* and *W. Digby*, or the survivor of them, his executors or administrators, should, *immediately after the decease of the said Frances Ann Pryce*, or in her lifetime if she should by any deed so direct or appoint, by mortgage, sale, or other disposition of all or any part of the said manors, hereditaments and premises thereinbefore granted and demised, for all or any part of the said term of 500 years, or by and out of the rents, issues and profits of the same premises, or by all or any of

the said ways or means, or by any other such ways or means as the said trustees should think reasonable and proper, levy and raise for the portion or portions of such child or children, other than and except an eldest or only son, the sum of 5000*l.*; and pay or divide the same in the manner therein particularly mentioned." Upon this case it was contended that the term of 500 years being created out of the life estate, and not being made to commence after the death of the tenant for life, vested in the trustees from the time when the marriage settlement was executed; and that the power to grant leases for 21 years was subject to the term of 500 years, that being the first legal estate. It was urged contra, that the power to grant leases destroyed the outstanding term, and that the defendant claiming under *W. B. Grey* was estopped from setting up the term. The learned judge being of this latter opinion, directed the jury to find a verdict for the lessor of the plaintiff, which they did accordingly.

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*Campbell*, last term, moved for a rule nisi for a new trial. First, the learned judge ought not, under the circumstances, to have compelled the production of the lease. There was no proof of any notice having been served on the defendant to produce the lease; and though the attorney had been served with a subpœna ducestecum, still his own declaration that he had received the lease, and held it confidentially, in his character of attorney, was a sufficient answer to that: especially as that declaration was corroborated by the production of the proceedings in chancery, the nature of which made it evident that the attorney did hold the lease in a professional and confidential capacity. Secondly, the learned judge ought to have required the lessor of the plaintiff to give some evidence, explaining the circumstance of the lease being in the possession of the lessor in a cancelled state, and rebutting the presumption arising from thence that the lease had been surrendered. It is true, that since the passing of the Statute of Frauds, the mere cancellation of a lease does

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not operate as a surrender, *Roe v. The Archbishop of York* (a). But here the lease was not only in a cancelled state, but had reverted to the possession of the lessor; and both those circumstances combined, raised the presumption that there had been a surrender in writing or by operation of law, and threw upon the lessor of the plaintiff the burthen of rebutting that presumption, by producing evidence explanatory of those circumstances. Thirdly, the defendant was not estopped from setting up the outstanding term in answer to the lease. There was no privity between the defendant and the lessor of the plaintiff; the defendant was in the situation of a purchaser, whether by a fine or a rack-rent was immaterial, or of a mortgagee after a prior mortgage executed. In *Goodtitle v. Morgan* (b), there were three mortgages, and it was held that the third mortgagee, having obtained the legal estate, might maintain ejectment against both the former mortgagees. [Lord Tenterden, C. J. In that case the third mortgagee had got in an outstanding term.] Suppose the case, that the first mortgagee brings ejectment against the second mortgagee. There a question very similar to the question in the present case would arise, namely, whether the second mortgagee could set up a term existing prior to the first mortgage; and upon the authority of *Goodtitle v. Morgan* (b) it seems clear that he could. In this case, the trustees of the term might have maintained ejectment, to recover possession of the premises, for the purpose of raising the 5000*l.* for portions.

LORD TENTERDEN, C. J.—Upon the first and third objections I think there is no ground for granting a rule. With respect to the production of the lease; it is perfectly clear that Mr. Grey himself might have been subpoenaed at the trial and compelled to produce the lease, because it formed no part of his title; and if he might have been compelled to produce it, his attorney, who was his representative, and stood in his situation, was bound to produce it also.

(a) 6 East, 86.

(b) 1 T. R. 755.

With respect to the outstanding term; with a view to ascertain the real effect of that term, it is necessary to consider all the contents of the deed; for it is a well established rule that every deed is to be construed by reference to all that it contains. Now it appears from this deed, that an estate for life was given to Mrs. Grey, together with a power to grant leases for twenty-one years; that the term of 500 years was, in computation of time, to commence immediately, but, for some purposes, was not to take effect immediately; that Mr. Grey was to have an annuity, under his wife's power, for his life; and that, under the same power, a sum of money was to be raised as a portion for younger children. Now to hold that the term thus vested in the trustees was the first legal estate in the premises, not controllable by any other, would be in effect to render the power of granting leases null and void, because in that case the trustees might at any moment turn out the lessees. To avoid that inconvenience, and at the same time to give effect to all the provisions of the deed, we must consider the power to grant leases as superseding and controlling the term, and must hold that the term ought not to have effect until the trustees actually call it into operation. When they shall have called the term into operation, the power to grant leases will be determined; but until they do so, the term must be considered as subservient to the power. Upon the remaining objection I think there seems ground for granting a rule nisi. When the lease was produced at the trial, it came out of the possession, not of the lessee, but of the lessor; and it was produced in a cancelled state. The question then arose, upon whom the burthen lay of adducing evidence to shew how, and under what circumstances, it came to be in a cancelled state. In the case of *Roe v. The Archbishop of York* (a) the circumstances under which the lease had been cancelled were clearly explained. It appeared beyond a doubt there that the first lease had been cancelled solely for the purpose of granting a second good

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(a) 6 East, 86.

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and valid lease; the presumption of a good and valid surrender, which might otherwise have arisen from the instrument being in a cancelled state, was thereby rebutted; and it was held that the cancellation, under such circumstances, of the first lease, did not destroy the interest of the lessee. Nothing of that kind appears in the present case. The lease in the possession of Mr. Grey, if valid and subsisting, ought not to be in the state in which it is; and it seems to me a proper question for consideration whether the fact of its being in a cancelled state in the possession of the lessor, unexplained, was not *prima facie* evidence of a good and valid surrender; and whether, under such circumstances, it was not the duty of the party claiming under it as a valid subsisting lease to shew how it came to be in a cancelled state. For these reasons, and upon this point only, I am of opinion that a rule nisi for a new trial ought to be granted.

The other judges concurred, and a rule nisi was granted accordingly, against which

*Taunton and Maule*, now shewed cause. By the Statute of Frauds, "no lease shall be surrendered, unless it be by deed or note in writing, or by act and operation of law." There was no evidence of a surrender by either of those means in this case, nor any ground for presuming it. [*Bayley*, J. Certainly not by act and operation of law.] Nor by deed or note in writing. The cancellation of the lease, as it has been termed, that is, the fact of the names of the parties having been torn off, was not even *prima facie* evidence of a surrender by deed or note in writing; and the only presumption arising from that fact was, that the lessee contemplated surrendering, not that he had actually surrendered. There was no evidence that any deed or note in writing ever existed, consequently there could be no ground for presuming that it did. *Roe v. The Archbishop of York* (a) shews that since the passing of the Statute of Frauds, the

(a) 6 East, 86.

mere cancelling of a lease is not a sufficient surrender of the term thereby created; *Magenis v. M'Culloch* (a) is an express authority on the same point: and in the latter case, the reason for the rule is given, namely, that "the object of the statute was to take away the manner they formerly had of transferring interests in land by signs, symbols, and words only."

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*Campbell and Russell*, Serjt., contra. It is not contended that there was positive and conclusive evidence of a surrender in this case, but only that there was such *prima facie* evidence as warranted the presumption of a surrender, in the absence of evidence to rebut it on the part of the lessor of the plaintiff. The very fact of the lease being produced in a cancelled state was sufficient, unexplained, to raise the presumption, not only that the parties contemplated a surrender, but that they had adopted the necessary legal measures for completing the act which they so contemplated: and it was incumbent upon the lessor of the plaintiff, therefore, as the party claiming under the lease as a valid subsisting instrument, to rebut that presumption, by explaining the circumstances under which the cancellation took place. In *Roe v. The Archbishop of York* (b) it was stated in argument, and not denied, that although before the Statute of Frauds there could be no surrender of a thing lying in grant, except by deed, yet it was always considered that the cancelling of a lease of a thing lying in grant was evidence of a surrender; and in *Bacon's Abridgement* (c) it is laid down, that "if a lessee for life or years take a new lease of the same lands, though such second lease be void for any defect in the making or execution of it, yet it is a surrender of the first lease: and such contract for a new lease is good evidence to a jury of such surrender." Upon the same principle the fact of the lease being in a

(a) Gilb. Eq. Rep. 235, which is cited in *Thursby v. Plant*, 1 Wms. Saund. 236, n.

(b) 6 East, 86.

(c) Bac. Abr. *Lease*, (S.) 3; and see Com. Dig. *Surrender*, (J.) 1.

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cancelled state, was evidence in this case of a surrender, and should have been so left to the jury.

BAYLEY, J.—It seems to me that this is a perfectly clear case. Here is a lease that was duly executed, which found its way into the possession of the lessee, and which then began to operate. The Statute of Frauds (sect. 3,) says that no lease shall be surrendered, unless it be by deed or note in writing, or by act and operation of law. There is no pretence for saying that this lease has been surrendered by act and operation of law, so that the only question is, whether there is or is not reasonable ground for saying that it has been surrendered by deed or note in writing. The lease is now in the possession of the lessor—how it came there does not appear. The names of the parties are cut off—how they came to be cut off does not appear. But, considering the period of time which has elapsed since the lease was granted, and the situation in which these parties have been during part of that time, is there any foundation for saying that there has been a note in writing by which this lease has been surrendered? The period of time at which it found its way into the possession of the lessor, *Mr. Grey*, does not appear. By what means he obtained it does not appear. Whether he obtained it immediately from *Mr. Courtail*, or from any person in whose hands *Mr. Courtail* had deposited it, or in what state it was when he obtained it, does not in any respect appear. But this does appear—that in the intermediate space of time there was a bill in Chancery, and an answer in Chancery, and that an order was made in that suit that this lease should be produced for the inspection of *Mr. Courtail*, when he should reasonably require it. Now that does raise the inference that there has been some dispute between these parties upon the subject of this lease, and upon the subject of the state in which the lease was. The lease is now in the possession of *Mr. Grey*; but that alone is no evidence of its having been surrendered; because it is properly

conceded that it is only upon the ground that we may be warranted, from the state in which the lease is, in presuming that there had been a note in writing, that we can say that the provision of the Statute of Frauds has been complied with. Now the fact of the lease being in the possession of Mr. *Grey*, and in a cancelled state, does not seem to me to furnish any degree of presumption, in this case, of there having been a note in writing. It was for Mr. *Grey* to make out that the lease had been duly surrendered: the burthen of proof in that respect lay upon him. It is true the lease is in his possession, and in a cancelled state; but that merely raises the inference that by some means or other it got into his possession in a cancelled state: and that alone will not do. That does not make out his case. He must rely upon a surrender by deed or note in writing, and there is really no evidence at all of there ever having been any such surrender. If the transaction had been of distant date; if the lease had been in the possession of Mr. *Grey*, without any dispute, for a long series of years; or if there had been any destruction of Mr. *Grey's* papers, or any change of residence, or any foundation for supposing that a note in writing had once existed and had since been destroyed or lost; that might have been a ground for raising the presumption that there was a note in writing which accompanied the lease when it got into Mr. *Grey's* possession. But in this case there is no ground for presuming that there ever was any note in writing which accompanied that document, when it found its way into Mr. *Grey's* possession; and therefore I am of opinion that the verdict was right, and that this rule ought to be discharged.

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LITLEDAL, J.—It is quite clear in this case that there was no surrender by act and operation of law. If a lessee for life enfeoffs the reversioner in fee, or the lessee and lessor join in a feoffment, or a lessee for life or years accepts a new lease from the lessor; in either of those cases a surrender by act and operation of law takes place. Then, if



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there was not a surrender by act and operation of law, the question is, whether a surrender by deed or note in writing can be presumed in this case; because the Statute of Frauds expressly requires that there shall be a surrender, either by deed or note in writing or by act and operation of law. I will put the case in the strongest possible way for the defendant. I will suppose that Mr. *Courtail* and Mr. *Grey* met together; that they agreed that Mr. *Courtail* should give up the possession of the property, and that the lease should be cancelled; and that in execution of that agreement they cut off the names, with the express intention of cancelling the lease. Even upon that state of facts, I am clearly of opinion that there would not have been a valid surrender of the lease within the meaning of the Statute of Frauds. Such an arrangement would involve the very mischief intended to be remedied by the statute. Before the statute passed, parties were accustomed to put an end to terms by parol, and the object of the statute was to prevent terms being surrendered by any mode except a deed or note in writing. If the case now before us had been submitted to the person who framed the statute, I have no doubt he would have said it was one of the cases intended to be guarded against. The question whether there has been a surrender or not, ought not to be decided upon loose parol evidence. To decide that there has been a surrender in this case, would be entirely to defeat the object of the Statute of Frauds. I do not mean to say, that if the parties had been out of possession during a period of twenty years, and there was, from other circumstances, reason to presume that there had been some note in writing, it might not have been left to the jury to say whether such note in writing had not once existed and had not subsequently been destroyed or lost. There are cases in which the question, whether there has been a valid surrender or not, has been made; but there was evidence of some note in writing in all of them. *Farmer v.*

*Rogers* (a) and *Smith v. Mapleback* (b) are instances of the nature I have alluded to. Here there is no evidence of any note in writing, and no ground for presuming that any ever existed. The verdict therefore was right, and the rule must be discharged.

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PARKE, J.—I think this a very clear case. It is admitted that the lease was once operative as a lease; therefore it cannot be got rid of except by a surrender, either by act and operation of law, or by a deed or note in writing. The argument is, that it may be presumed in this case that there was a surrender by a note in writing; but it appears to me impossible to draw any such inference. The fact of a lease being found in the possession of the lessor in a cancelled state, can only raise the presumption that it was the intention of the parties to put an end to the term by cancelling the lease. But the law does not allow such a mode of putting an end to a term; therefore the adoption of such a mode cannot raise the presumption that there has been a surrender by a note in writing. The only inference that we can draw from the facts of this case appears to me to be, that the parties intended by this step to put an end to the operation of the lease by means which the law does not allow; and if so, the lease still continues in operation.

Rule discharged.

(a) 2 Wilson, 26.

(b) 1 T. R. 441.



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FARR v. HOLLIS, Gent., one, &amp;c.

The bond given by the county treasurer to the clerk of the peace, under 12 Geo. 2, c. 29, extends to duties imposed on the treasurer by subsequent statutes.

A breach of such a bond may be assigned in the defendant, as treasurer, having received a certain sum of money, and omitted to account for it upon being required by the justices at sessions so to do, without adding that he was required to account by an order of justices.

Under 43 Geo. 3, cap. 47, (Militia Act,) it was the duty of the county treasurer, who

reimbursed payments made by overseers to the families of militia men, to transmit an account of such reimbursements to the treasurer of the county for which such militia men were serving. But it was not his duty to demand the amount, or to take legal proceedings for obtaining payment, or to notify to the justices of the sessions the transmissions of such account and neglect of payment, or to transmit to the justices of the sessions an account of similar payments made by himself to the treasurer of another county, that they might make orders for repayment upon the overseers of the parishes for which such militia men were serving.

**DEBT** on bond for 5000*l.*, dated 6th April, 1812, and another bond for 5000*l.* dated 19th April, 1814.

The defendant claimed oyer of the first bond, which appeared to be made to the plaintiff, clerk of the peace for the county of Southampton. He also craved oyer of the condition, in which, after reciting, that at the general quarter sessions of the peace on Monday, in the first week after the clause of Easter, to wit, the 6th day of April, 1812, before *James Burrough*, Esq., chairman, *William Chuter*, Esq., and others, &c., the above bounden *George Hollis* was by the said justices nominated and appointed treasurer and receiver of the rates and assessments made of the public services for the said county, for the year ensuing, upon his giving sufficient security to *William Dale Farr*, Esq., clerk of the peace of the said county, for the due and faithful execution of the trusts reposed in him according to the statute in that case made and provided, the condition was declared to be such, that if defendant, his executors, &c., should and did from time to time, whenever he or they should be thereunto required by the justices of the peace, assembled at any general quarter sessions of the peace to be held for the said county, or the major part of them, or by any committee of said magistrates duly appointed for that purpose, by any order of the said court of quarter sessions then made, or thereafter to be made, well and truly account for all and every such sum and sums of money as

should have been then in his or their hand or hands, or which should have been paid to or received by him or them, by means or on account of his said office of treasurer; and also should and did well and truly pay and apply the money so received by him, or which should be remaining in his or their hand or hands at the end of the said year, for which he had been so appointed treasurer as aforesaid, in such manner and to such person or persons as the said justices of the peace, or the major part of them at such general quarter sessions should direct, order and appoint; and also if the said defendant should duly and faithfully perform and execute all and every the trusts reposed in him by virtue of his said nomination or appointment to the said offices, then this obligation, &c." The defendant then pleaded performance generally. He also craved oyer of the second bond and condition, which were in the same form as the first, concluding with the like plea of performance. The plaintiff in his replication assigned the following breaches of the condition of the first bond:

First breach, that defendant, after he was so nominated and appointed treasurer and receiver, to wit, on the 6th April, 1812, at &c., did give sufficient security to plaintiff, then being clerk of the peace for the said county, for the due and faithful execution of the trusts reposed in him, according to the statute in that case made and provided, to wit, the said writing obligatory in the first count and plea thereto mentioned; and thereupon then and there took upon himself the said offices of and became and was treasurer and receiver, according to the said nomination and appointment as last aforesaid; and that afterwards, to wit, on &c., and on divers other days and times whilst defendant was such treasurer as last aforesaid, divers large sums of money, amounting in the whole to a large sum of money, to wit, 1000*l.* were paid to and received by defendant by means and on account of the said last mentioned office of treasurer; and that afterwards, to wit, 28th April, 1813, at &c., defendant was required by the justices of the peace assembled at the general quarter sessions of the peace for said county then and there

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holden, to account for all sums of money before then paid to and received by defendant by means of and on account of his said last mentioned office of treasurer; yet defendant did not, nor would when he was so required as aforesaid, or at any other time, account for said sums of money so paid to and received by him as aforesaid, or any part thereof; but, on the contrary, said defendant wholly neglected and refused so to do; and the same are, and every part thereof still is, wholly unaccounted for by said defendant, contrary to the form and effect of said condition of &c., to wit, at &c. Verification and prayer of judgment.

The second breach stated, that afterwards and whilst defendant was such treasurer as last aforesaid, to wit, 9th July, 1812, at &c., defendant, out of the moneys then and there in his hands as such treasurer as last aforesaid, did reimburse to the overseers of the poor of the parish of Portsmouth in said county of Southampton, in pursuance of the statute in such case made and provided, a sum of money, to wit, the sum of 7*l.* 16*s.* on account of certain weekly allowances before then paid by the said overseers of the parish of Portsmouth to the family of one *James Smith*, according to the form of the statute in such case made and provided; said *James Smith* during all the time for which such allowances were paid as aforesaid being a private militia man, serving in the militia of the county of Monmouth as a substitute for *John Millett*, of the parish of Camvy in the last mentioned county, and being embodied and called out into actual service, and having his said family during all that time dwelling in said parish of Portsmouth, and unable to support itself, to wit, at Gosport aforesaid; and that it was one of the trusts reposed in said defendant, by virtue of said nomination and appointment of him, said defendant, as last aforesaid, and it was the duty of said defendant in that behalf to deliver or transmit to the treasurer of said county of Monmouth an account of said sum of money so reimbursed by him, said defendant, as aforesaid, signed by one or more of the justices of the peace of said county of Southampton, and thereafter forthwith to demand, have,

and recover said last mentioned sum of money from said treasurer of said county of Monmouth, to wit, at &c.; and that defendant afterwards, to wit, on &c., at &c. did transmit to the treasurer of the county of Monmouth, an account of said sum of money so reimbursed by him said defendant as aforesaid, duly signed in that behalf, according to the form of the statute in such case made and provided; yet said defendant, not regarding his duty in that behalf, did not nor would duly and faithfully perform and execute all and every the trusts reposed in him by virtue of his said nomination and appointment as last aforesaid, but then failed and made default in this, to wit, that he, said defendant, did not nor would forthwith, after the transmitting of said account as aforesaid, or at any other time, demand, have or recover of and from the said treasurer of said county of Monmouth said sum of money so reimbursed by him, said defendant, as aforesaid, although the same might have been so had and recovered in that behalf, but, on the contrary thereof, said defendant wholly omitted and neglected to demand, have or recover the same or any part thereof, contrary to the said trusts so reposed in him as aforesaid, and in breach of the condition of said writing obligatory in that behalf; and by reason of the premises, the said last mentioned sum of money being still unpaid is wholly lost to the public stock of said county of Southampton, to wit, at &c. Verification and prayer of judgment.

The third breach stated, that said defendant having taken upon himself said office of and being such treasurer as in said first breach mentioned, did afterwards and whilst defendant was such treasurer as aforesaid, to wit, on &c. at &c., out of the moneys then and there in his hands as such treasurer as aforesaid, reimburse the overseers of the poor of the parish of Portsmouth, in the said county of Southampton, in pursuance of the statute in such case made and provided, a certain sum of money, to wit, 2*l.* 12*s.*, on account of certain other weekly allowances before then paid by said overseers of the parish of Portsmouth to the family of one *William Jones*, according to the form of the statute,

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&c., said *William Jones* during all the term for which said allowances were so paid as aforesaid being a drummer serving in the militia of the county of Monmouth, and being embodied and called out into actual service, and having left his said family during all that time dwelling in said parish of Portsmouth, and unable to support itself, to wit, at &c.; and that it was one of the trusts reposed in defendant by virtue of his nomination and appointment as aforesaid, and it was his duty in that behalf to deliver or transmit to the treasurer of said county of Monmouth an account of said sum of money so reimbursed as aforesaid, signed by one of the justices of the peace of said county of Southampton in that behalf, and in case of neglect of payment of said last mentioned sum of money to him, said defendant, by the treasurer of said county of Monmouth within a reasonable time after the delivering or transmitting said account as aforesaid, to cause and procure the necessary proceedings at law, to wit, by action, to be had and taken against said last mentioned treasurer, for obtaining payment of said last mentioned sum of money by and from said last mentioned treasurer to him, said defendant, to wit, at Gosport aforesaid; that afterwards, to wit, on &c., said defendant did transmit to the treasurer of said county of Monmouth an account of said sum of money so reimbursed by him, said defendant, as aforesaid, duly signed in that behalf, according to the form of the statute in such case made and provided, at &c. and although a reasonable time since the transmitting of said last mentioned account has long since elapsed, yet said treasurer of said county of Monmouth did not nor would pay to said defendant said last mentioned sum of money within such reasonable time aforesaid, or at any other time whatsoever, but on the contrary, wholly neglected so to do, to wit, at &c.; that defendant, not regarding his duty in that behalf, did not nor would perform and execute all and every the trusts reposed in him by virtue of his nomination and appointment as aforesaid, but therein failed and made default in this, to wit, that said defendant hath not

caused or procured the necessary or other proceedings at law as aforesaid to be had and taken against said treasurer of said county of Monmouth, for the obtaining payments of said last mentioned sum of money in that behalf, but, on the contrary thereof, hath wholly omitted and refused so to do, contrary to the said trusts so reposed in him as aforesaid, and in breach of the condition of said writing obligatory in that behalf; and by reason of the premises, said last mentioned sum of money being still unpaid is wholly lost to the public stock of said county of Southampton, to wit, at &c. Verification and prayer of judgment.

The fourth breach stated reimbursement by defendant to the overseers of Portsea of 1*l.* 4*s.*, paid by them to the family of *George Bowen*, a private in the Bristol militia, and that it was one of the trusts reposed in defendant by virtue of his nomination and appointment as aforesaid, and his duty in that behalf, to deliver or transmit to the treasurer of said county of said city of Bristol an account of said sum of money so reimbursed by him as aforesaid, signed by one or more of the justices of the peace of said county of Southampton; and in case of neglect of payment of such money to him the said defendant by the treasurer of said county of said city of Bristol, within a reasonable time after the delivery or transmitting said accounts as aforesaid, to notify or report said delivery or transmitting said accounts by him, said defendant, and the neglect of said treasurer as aforesaid, to the justices of the peace of said county of Southampton, in the then next general or quarter sessions of the peace for said county assembled, at &c.; that defendant afterwards, to wit, on the day and year aforesaid at, &c., did transmit to the treasurer of the county of the city of Bristol an account of said sum of money so reimbursed by him said defendant as aforesaid, duly signed in that behalf, according to the form of the statute; and that, although a reasonable time since the transmitting of said accounts has long since elapsed,

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yet said treasurer of the said county of said city of Bristol did not nor would pay said sum of money, or any part thereof, to said defendant, within such reasonable time as aforesaid, or at any other time whatsoever, but on the contrary thereof wholly neglected so to do, at &c.; that said defendant did not nor would duly and faithfully perform and execute all and every the trusts reposed in him by virtue of his nomination and appointment aforesaid, but on the contrary thereof therein wholly failed and made default in this, to wit, that said defendant did not nor would notify or report to the justices of said county of Southampton, in the then next general or quarter sessions of the peace for said county assembled, (although such sessions have long since been held,) or any other sessions whatsoever, the transmitting of said accounts by him said defendant to said treasurer of the county of the city of Bristol as aforesaid, and the neglect of payment thereof by said last-mentioned treasurer as aforesaid, but on the contrary thereof wholly omitted and neglected so to do, contrary to the said trusts so reposed in him as aforesaid, and in breach of the condition of said writing obligatory in said first count mentioned; and by reason of the premises, the justices of the said county of Southampton have been hindered and prevented from taking the necessary proceedings for the recovery of said last mentioned sum of money, and the same being still unpaid is wholly lost to the public stock of said county of Southampton, at &c. Verification and prayer of judgment.

The fifth breach stated, that before the transmitting of the accounts to defendant hereinafter next mentioned, to wit, 12th July, 1812, the treasurer of the county of Warwick had reimbursed to the overseers of the poor of the parish of Nuneaton, in the county of Warwick, in pursuance of the statute in that case made and provided, a sum of money, 5*l.* 4*s.*, on account of certain weekly allowances before then paid by said overseers to the family of one *John Austin*, according to the form, &c.; said *John*

*Austin*, during all the time for which such allowances had been paid as aforesaid, being a private militia-man serving in the militia of said county of Southampton, as a substitute for one *Robert Reeves*, of the parish of Heckfield, in the said county of Southampton, and being embodied and called out into actual service, and having left his family, during all that time, dwelling in said parish of Nuneaton, and unable to support itself, at &c.; that after the making of said writing obligatory, and whilst said defendant was such treasurer as aforesaid, to wit, on &c., the said treasurer of said county of Warwick transmitted to said defendant, as and being such treasurer as aforesaid, a certain account, duly signed by one of the justices of the peace of said county of Warwick, of said sum of money so reimbursed by him said treasurer of said county of Warwick aforesaid; and said defendant, as and being such treasurer as aforesaid, out of the moneys then and there in his hands as such treasurer as aforesaid, then and there paid to such treasurer of said county of Warwick such last mentioned sum of money, to wit, at &c.; that it was one of the trusts reposed in him said defendant, by virtue of said nomination and appointment aforesaid, and it was the duty of said defendant in that behalf, to transmit such signed account, and also an account of said moneys so repaid by him in pursuance thereof aforesaid, to the justices of the peace for said county of Southampton, at the next general or quarter sessions of the peace for said last mentioned county, in order that said justices at such sessions might make an order for the overseers of the poor of said parish of Heckfield, for which said *John Austin* so served as aforesaid, to pay said sum of money to the treasurer of said county of Southampton, at &c.; yet the said defendant, not regarding his duty in that behalf, did not nor would perform and execute all and every the trusts reposed in him by virtue of his nomination and appointment aforesaid, but therein wholly failed and made default in this, to wit, that said defendant did not nor would transmit to the

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justices of the peace for said county of Southampton, at the then next sessions for said county, or at any other subsequent sessions, such signed account as aforesaid, and also an account of the money so repaid by him as last aforesaid, but on the contrary thereof wholly omitted and neglected so to do, contrary to said trusts as aforesaid; and in breach of the condition of said writing obligatory, and by means of the premises, no order hath been made or could be made for the overseers of said parish of Heckfield to pay said sum of money as aforesaid, and the same being still unpaid is wholly lost to the public stock of said county, to wit, at &c. Verification and prayer of judgment.

The twelfth breach, which was assigned on the condition of the second bond, stated, that before the transmitting of the account thereafter mentioned, to wit, 10th Oct. 1814, the treasurer of the city of New Sarum had reimbursed the overseers of St. Edmund in that city 2*l.* 12*s.* on account of weekly allowances paid by such overseers to the family of one *John Brown*, he being a private militia-man, serving in the militia of the county of Hants as a substitute for one *William Smith*, of Bishop's Waltham, in that county; that after the making of the said last mentioned writing obligatory, and whilst the defendant was such treasurer as last aforesaid, to wit, 13th October, 1814, the said treasurer transmitted to the defendant an account duly signed by, &c. of the sums of money so reimbursed, and that the defendant being treasurer paid the said last mentioned sum to the treasurer of the said city, and afterwards transmitted the last mentioned signed account, and also an account of moneys repaid by him in pursuance thereof, to the justices of the peace for the county of Hants, at the then next general quarter sessions for that county; that it was one of the trusts reposed in the defendant by virtue of his appointment, and his duty in that behalf, to procure an order to be made by the said justices at such sessions for payment of the said last mentioned sum of money to the treasurer

of the county of Southampton, within fourteen days after the receipt of such order; but that the defendant did not nor would procure any order to the overseers of B. W. to pay the last mentioned sum of money to the treasurer of the county of Southampton.

To these pleas the plaintiff demurred specially.

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*E. Lawes*, Serjt., in support of the demurrers. No question arises upon the form of the defendant's plea of performance. The questions arise upon the replication. It appears by the condition of the bond that it was given according to the statute. One statute only is mentioned in the condition of the bond and in the replication. The terms of the condition require an order, and if they did not, a requisition could only be made by order. [*Bayley*, J. Then the allegation of requisition would imply an order. If the party were present in Court, and were requested by all the justices to account, would not that be sufficient? The alternative presented by the condition is, "by the justices assembled at any quarter sessions, or by any committee of the said magistrates duly appointed for that purpose." *Parke*, J. If the plaintiff assign his breach in the language of the condition, he must prove an order, if an order be necessary.] In *Leneret v. Rivet* (a), the defendant, in consideration that plaintiff would acquit and discharge one *Ogle* of a debt due from *Ogle* to the plaintiff, and would permit him to carry out of plaintiff's house certain goods of *Ogle's*, promised to pay plaintiff the said 10*l.* at such a day; allegation that he acquitted and discharged *Ogle* of the said 10*l.* debt, and suffered him to carry away said goods; but defendant had not paid said 10*l.* The declaration was held insufficient, for not shewing how the plaintiff acquitted *Ogle*, which could not be without deed, and judgment was arrested. [*Parke*, J. The Court would not now arrest judgment in such case.] Here it is only urged as ground of special demurrer. The 12 *Geo. 2*,

(a) Cro. Jac. 503.

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c. 29, s. 6, looks to an order; it does not say a word about a committee. The words of the condition are, "by any order of the said Court of Quarter Sessions now made, or hereafter to be made." [Bayley, J. The bond was given when the defendant was appointed to the office. The order now made cannot, therefore, refer to a by-gone requisition to account. Parke, J. The committee might have been appointed by an order already made. There is something to which the words can apply. It is, therefore, more reasonable to refer these words to the next antecedent, namely, the appointment of the committee.] In the case of a committee it is equally necessary that there should be an order. The words must be referred to the order to account, or to the order to appoint a committee. Except in overseers' accounts, the Court have no power, *Rex v. Townsend* (a). [Bayley, J. Cannot they make an order to demand?] The party must be called upon by an order; they must not go to nisi prius in doubt. If the condition of the bond be larger than the recital, it must be narrowed down to meet the intention of the parties. Here the plaintiff must contend to enlarge it beyond the words. The recital speaks of an appointment to the office of treasurer and receiver of the rates and assessments made for the public service of the said county. Now no breach after the first has relation to any sum received by the defendant as county treasurer, with reference to the county rate; they all apply to the militia acts. There is no allegation of the receipt of a shilling. [Parke, J. Does not the act direct him to reimburse himself from the treasurer of another county?] There is no statute which requires the performance of the acts required by this record. The defendant has no means of recovering this sum. The second breach alleges that it was his duty to take proceedings; the third that it was his duty to report; the fourth that it was his duty to transmit. The only breach which has any reference to the second bond is the fifth. The duty

(a) 1 Bott, 304, 5th ed.

there stated with reference to the statute is meant to be assigned, under 43 *Geo. 3*, c. 47, s. 16. But they have not assigned a breach of that duty. The statute directs that the treasurer shall, under certain circumstances, transmit accounts; it does not require him to transmit them signed. [*Parke, J.* If it was his duty to deliver, it was his duty to get them signed. *Bayley, J.* If the duty be to deliver or transmit, an allegation that defendant did not transmit is insufficient.]

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*Dampier, contra.* It is objected that duties created subsequently to the passing of the first act are not within the condition; and it is contended that the language of the condition is to be restrained by the recital. There are many cases in which the provisions of a statute have been held to extend to subsequent statutes. The provisions of *Magna Charta*, with reference to relief of dignities, have been held to extend to dukes and marquesses, titles introduced since that statute. The Statute of Gloucester (*a*), which gives costs, has been held to extend to actions given by subsequent statutes, 2 *Last*. 289. The Statute of Uses (*b*) has been held to extend to devises, which were introduced by 32 *Hen. 8* (*c*). 18 *Eliz. c. 5*, which gives costs to defendants in popular actions, extends to actions upon subsequent statutes (*d*). So 31 *Eliz. c. 5*, s. 2, which forbids the offence against any penal statute being laid in any other county than that in which it was committed, was held to extend to the Pilot Act, 52 *Geo. 3*, c. 39, *Barber, qui tam, v. Tilson* (*e*). So an assistant overseer, whose office is created by 59 *Geo. 3*, c. 12, is liable to the penalty enacted by 17 *Geo. 2*, c. 3, for not permitting an inspection of the poor rate, *Bennett v. Edwards* (*f*). So Exchequer bills (*g*),

(*a*) 6 *Edw. I.* c. 6.

(*b*) 27 *Hen. VIII.* c. 10.

(*c*) Cap. 1.

(*d*) *Williams, qui tam, v. Drewe*,  
Willes, 392.

(*e*) 3 *M. & S.* 429.

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(*f*) 1 *M. & R.* 482; 7 *B. & C.*  
586.

(*g*) See proceedings under 48  
*Geo. 3*, c. 1, to obtain payment of  
a lost exchequer bill. *Mann. E. P.*  
2nd ed. 344.



situated, out of the public stock thereof; and every weekly allowance which shall be paid to the family of any non-commissioned officer, &c., in any other county, &c., than that for which such non-commissioned officer, &c., shall serve, or to the family of any private man in any other parish, &c., than the one for which such private militiaman shall serve, shall respectively be reimbursed in the manner hereinafter mentioned." If the statute had merely used the term "transmit," the breach would have been directly assigned. It was the duty of the defendant to get the account signed. It ought to have been pleaded. It was defendant's duty to proceed by legal means to obtain reimbursement. At least he should notify to the justices. The 12th breach, the 5th to the first bond, is on the 17th section. The process is for the treasurer to send his vouchers received from foreign treasurers to the justices. The parish now enjoys the advantage which ought to be enjoyed by the county. This breach is assigned in the words of the statute. The other breaches are by implication. The statute says, that the party shall be proceeded against, but does not say by the treasurer. [*Bayley, J.* If he attempts to debit the county, will it not be a sufficient answer, "you have not done all that is necessary"? This will bring it all upon the first breach.] With respect to the duties and trusts, trusts may be duties of strict obligation. The principal point is, whether the general words are restrained by the particular words of the recital. The 32 *Hen. 8, c. 34*, has been held to extend to the grantee of the reversion of every common person, though the king only is mentioned in the preamble. *Co. Litt. 215 (a)*. [*Bayley, J.* The words "according to the statute," apply to "sufficient security." The sentence may be transposed and read "according to the statute in that case made and provided, for the due and faithful execution of the trusts reposed in him." The doubt is, whether the condition

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(a) *Co. Litt. 215 a.* first resolution; 2 *Tho. Co. Litt. 332*.



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is restricted to sums received by him. Well and truly account, means satisfy, *Topham v. Braddik* (a). Contracts are not to be construed according to the strict letter, but with reference to the general scope and intention of the whole instrument; *Gale v. Reed* (b), *Howell v. Richards* (c). He also referred to *The King v. Hollond* (d).

*E. Lawes*, Serjt., in reply. Though it be in general sufficient to declare in the words of the covenant, it is not so where the intent requires that the allegation should be otherwise framed. No remedy is stated. If before the act there was no remedy to recover against the treasurer of the other county, none exists now. Here is an enactment, but no means of enforcing it; but the bond would be a means of enforcing it. No means are provided by which the treasurer of Hampshire could have recovered. Therefore there is no breach of the bond. It was never considered within the bond. The cases which have been cited are dissimilar to the present. Those were cases upon statutes, this is a case of contract. It is not the duty of the treasurer to attend the sessions; *Com. Dig. Justices* (e). [*Bayley*, J. Whether the treasurer is bound to attend the sessions is immaterial.] The Court has nothing before it which shews that these sums were included in the accounts. [*Bayley*, J. It should have been replied, that they were not included.] These sums may have been lost by other means. The provision may, perhaps, be considered as merely directory.

**BAYLEY, J.**—Upon the first breach assigned, an objection was taken on the part of the defendant, that he was not required to account by an order of the court of quarter sessions. It is therefore necessary to look at the language of the condition: “shall and do from time to time,

(a) 1 Taunt. 572.

(c) 11 East, 633.

(b) 8 East, 80. And see *Albert v. Hesse*, ante, iii. 406.

(d) 5 T. R. 619.

(e) *Semble*, D. 7.

whenever he or they shall be thereunto required by the justices of the peace assembled at any general quarter sessions of the peace to be held for the said county, or the major part of them, or by any committee of the said magistrates duly appointed for that purpose." Here the defendant makes a stop. But it appears to us that that cannot be the true construction. The quarter sessions have the power of requiring by order, but the committee have no such power. The subsequent words, therefore, refer to the appointment of a committee. That disposes of the objection to the first breach. The other breaches are framed upon the militia act. They charge that the defendant was bound to pay under the militia act, and that he has not taken proper steps for the purpose of obtaining reimbursement. It is objected, that the bond being given according to the requisitions of 12 *Geo.* 2, c. 29, it does not apply to the duty cast on the treasurer by a subsequent statute. The consequence of so holding would be, that the security given by the treasurer would not extend to sums levied under any subsequent acts, but must be confined to money levied under 12 *Geo.* 2. But I am of opinion that duties imposed upon the officer between the passing of 12 *Geo.* 2, c. 29, and the date of the bond, come within the meaning of the condition. The language of the bond refers to the time when it was dated. If it were sought to charge the defendant with sums imposed after the date of the bond, I think he would not be liable; but the terms of the condition are large enough, and it would be quite unreasonable to confine the operation of the bond to sums received under the first act. If it had been meant so to restrict the defendant's liability, it would have been easy to confine it by express words to duties cast upon him by 12 *Geo.* 2, c. 29. But the language being general, it must be applied to all sums receivable under his office of treasurer at the time that the bond was given. The word "trusts" is here equivalent to "duties." The 9th section of 43 *Geo.* 3, c. 47, directs, "that every such

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weekly allowance to be paid under this act to the family of any non-commissioned officer or drummer, shall be repaid to the overseer or overseers of the poor of the parish, &c. in which such family was relieved, by the treasurer of the county, &c., in which such parish, &c., is situate, out of the public stock thereof; and every weekly allowance which shall be so paid to the family of any non-commissioned officer or drummer in any other county, &c., than that for which such non-commissioned officer or drummer shall serve, or the family of any private man in any other parish, &c., than the one for which such private militia-man shall serve, shall respectively be reimbursed in the manner hereinafter mentioned." Then the 16th section directs, "that every such treasurer who shall reimburse to any such overseer or overseers as aforesaid any sum or sums of money, in pursuance of this act, on account of any such weekly allowance paid to the family of any non-commissioned officer or drummer, or any private militia-man serving in the militia of any other county, riding or division, shall deliver or transmit an account of such money as he shall have so reimbursed as aforesaid, signed by one or more justices, &c., for the county, &c., where such family shall dwell, to the treasurer of the county, &c., in the militia whereof such non-commissioned officer, &c., shall serve; and thereupon the treasurer, to whom such account shall have been delivered or transmitted as aforesaid, shall forthwith pay to the treasurer who shall have so delivered or transmitted such account, the sum or sums so by him reimbursed to such overseer or overseers, and shall be allowed the same in his accounts." The 53d Geo. 3, c. 81, imposes a penalty of 50*l.* in case of neglect by county treasurers to repay to the treasurers of other counties, in cases where repayment is directed to be made, within two months after the expiration of three months. The second and third breaches describe it as a duty of the treasurer to deliver or transmit accounts; but there being no direction in any of the acts that the treasurer should take upon him-

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self a burthen which must be attended with some degree of expense, we are of opinion that those breaches are not well assigned. With respect to the fourth breach, we are of opinion that it is not well assigned. Looking at the language of the statute, the duty of transmitting is clearly pointed out. The duty of notifying and reporting is not pointed out. When the treasurers' accounts are examined, if it appears that the money has not been paid, you may proceed by way of action, or enforce the penalty. Another objection to this breach is, that it is not stated what interval elapsed between the neglect complained of and the holding of the sessions; and we think it ought to have been alleged that there was a reasonable interval. The fifth breach, it appears to me, may very well be sustained, for the non-performance of the duty imposed by the 17th section. The sixth and seventh breaches are the same as the second and third, and cannot, therefore, I think, be supported, for the reasons already given. The observations upon the fourth breach apply to the eighth and ninth. The ninth, tenth, and eleventh breaches are open to one of the objections taken to the fourth. The twelfth breach is insufficient, because the statute does not direct that the treasurer is to cause the order to be made. I am therefore of opinion that the first and fifth breaches are well assigned, but that defendant is entitled to judgment upon the other breaches.

LITLEDALE, J.—I am of the same opinion. Trusts here are the same as duties, and the question is, whether the bond extends to trusts or duties cast on the county treasurer since the passing of 12 Geo. 2, c. 29, and before the execution of the bond. I am of opinion that the bond extends to the new duties. Cases have been cited for the plaintiff in support of this construction; to which may be added *Wilkes v. Williams* (a). In that case the defendant pleaded his privilege as an officer of the High Court of

(a) 8 T. R. 631.

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Chancery, but did not allege that his office, which was that of tipstaff, was an ancient office. It was held that newly created offices were within the prescriptive privilege. Suppose a per-centage had been given upon all sums paid, the treasurer would not have been confined to sums received under the first act; so he ought to bear the additional duties. I think an order of sessions was not necessary. The question is, whether the words "by any order of the said court of quarter sessions" relate to the requisition to account, or to the constitution of the committee. The rule is to give effect to all the words, if possible. If the request was to be made by an order of court, it could not be made by an order of the committee. It appears to me that the words apply to the constitution of the committee. It was not necessary that the justices should be assembled in Court. In the Common Pleas every thing is said to be done "by the justices," not by the Court. The fifth breach I also think good, for the reason stated by my brother *Bayley*. The other breaches I think not good. If the defendant did not do what was expected from him, he might be turned out of his office; but the not transmitting the accounts did not subject him to indictment, or create a breach of the condition of the bond. He was not bound to incur expense.

PARKE, J.—I concur in opinion that the plaintiff is entitled to judgment on the first and fifth breaches. I think that the order mentioned in the condition cannot refer to all the preceding branches of the sentence; it can have no reference to the request to account; it must apply to the appointment of the committee. If there ought to have been an order of sessions, then it is implied in the words of the breach, and such an order must be proved on the trial of an issue taken upon this breach. It is not necessary now to say whether such proof could be required. The bond applies to trusts and duties created subsequently to 12 *Geo.* 2, c. 29. Upon the twelfth breach the plaintiff

relies on 43 *Geo. 3*, c. 47, s. 9 & 16. The recital in the condition of the bond is ambiguous. The words "according to the form of the statute," may apply either to the bond or to the duties. "Trusts reposed in him," are duties cast upon the county treasurer by law at the time the bond is given. The statute does not point out what is to be done by the treasurer in order to obtain reimbursement. It imports no obligation to commence an action or to give notice at the next sessions. All that we can say is, that he ought to use due diligence. These breaches appear to me to be assigned in too precise terms. The fifth breach to the first bond is expressly laid. The twelfth breach would have been properly assigned if it had negatived both branches.

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LITLEDALE, J.—With respect to the recital in the condition, the words would have been "by virtue of the statute," and not "according to the statute," if the obligation had been limited to trusts created previously to 12 *Geo. 2*, c. 29.

Judgment for the plaintiff on the first and fifth breaches assigned on the first bond, and for the defendant on the residue.

JOHN DOE, on the joint and several demises of the Rev.  
HENRY DELVES BROUGHTON and DANIEL WILLIAM  
STOW, v. JOHN GULLEY.

THIS was an action of ejectment, tried at the Spring Assizes for the county of Surrey, in the year 1828, before Burrough, J. when a verdict was found for the plaintiff subject to the opinion of the Court on the following case:—

A term created by an incumbent before 57 *Geo. 3*, c. 99, for the purpose of charging his rectory with

an annuity, may be legally assigned since that act to a person who advances a sum for the redemption of the annuity.

So, though the rector be a party to the assignment, and by the same instrument attempts to subject the rectory to the repayment not only of that sum, but also of other moneys then and previously advanced to him by the assignee.

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On 10th August, 1811, the Rev. *Bryan Broughton* became rector of Long Ditton, Surrey; and being such rector, by an indenture bearing date 6 January, 1814, made between him and *William Bonnell James*, in consideration of 600*l.*, he granted to *James* an annuity of 88*l.* 7*s.* for the term of 99 years, if *B. Broughton* should so long live, charged upon the rectory of Long Ditton, with the usual power of distress and clause of repurchase, and with covenants on the part of *B. Broughton* that the rectory should continue subject to the annuity as long as it was unpaid, and that he would not resign without the consent of *James*. And for better securing the said annuity, *B. Broughton* did grant, bargain, sell, and assign to *James*, all the rectory of the parish and parish church of Long Ditton, and the glebe lands, tithes, oblations, obventions, and other the rights, members and appurtenances thereof: To hold the same to *James*, his executors &c., from the day next before, &c. for the term of 100 years then next ensuing, if *B. Broughton* should so long live and continue to be rector of the said rectory, without impeachment of waste, so far as the said *B. Broughton* could grant that privilege: Upon trust for the better securing to *James*, his executors, &c. the due and regular payment of the annuity. Which deed was indorsed as follows: (Here the indorsement was set out.) By a certain other indenture, bearing date 1 June, 1815, made between the same parties, with a like indorsement thereon as to the inolment, in consideration of 1000*l.* *B. Broughton* granted to *James* another annuity of 151*l.* for the like term of 99 years, if *B. Broughton* should so long live, charged upon the said rectory, with the like clauses, powers and provisions as in the indenture of 6 January, 1814. And for better securing the last mentioned annuity, and in consideration of 10*s.* *B. Broughton* did grant, bargain, sell, and demise to *James*, all the rectory and premises contained in the before mentioned indenture of 5 January, 1814: To hold the same from the day next before, &c. for the term of 100 years, if *B. Broughton* should so long live and continue to be rector of

the said rectory: Upon trust for better securing the said last mentioned annuity. By a certain other indenture, bearing date 26 October, 1816, and made between the said parties, with a like indorsement thereon as to the inrolment, in consideration of 400*l.*, *B. Broughton* granted to *James* another annuity of 60*l.*, for the term of 99 years, if *B. Broughton* should so long live, charged upon the said rectory. And for better securing the same, *B. Broughton* did ratify and confirm to *James*, his executors, &c., all the said rectory and premises particularly described in the before mentioned indentures: To hold the same for the residue and remainder of the term of 100 years granted by the indenture of 1 June, 1815: Upon further trust for securing the last mentioned annuity of 60*l.* No proof was given of the inrolment of the memorials of the three several annuities further than the indorsements upon the deeds as before mentioned. These annuities being unredeemed, and the terms created for securing them being still subsisting, by an indenture bearing date 26 May, 1820, and made between *B. Broughton* of the first part, *James* of the second part, and *William Robert Broughton* of the third part, reciting the indentures of 6 January, 1814, 1 June, 1815, and 26 Oct. 1816; and that *B. Broughton* was indebted to *W. R. Broughton* in the sum of 1000*l.* secured by three bonds, dated respectively, &c., and in the sum of 1000*l.* lent by *W. R. Broughton* to *B. Broughton* on, &c., for which no specific security had been given; and that *W. R. Broughton* had agreed to lend *B. Broughton* the further sum of 3,500*l.*, in order to enable him to redeem the annuities, and for his other occasions, in consideration of 2000*l.* paid to *James*, of 2000*l.* due to *W. R. Broughton*, and of 1,500*l.* advanced and paid to *B. Broughton*, making together 5,500*l.*, *James*, at the request and by the direction of *B. Broughton*, did bargain, sell and assign unto *W. R. Broughton*, his executors, &c., all the said sums of 600*l.*, 1000*l.*, and 400*l.*, the purchase money of the said three annuities; and for the considerations aforesaid, *James* did bargain, sell, and assign,

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and *B. Broughton* did grant, bargain, sell and assign, ratify and confirm unto *W. R. Broughton*, all the said rectory of the said church of Long Ditton, and the messuage or tenement and rectory house, glebe lands, tithes, oblations, &c., arising, &c. : To hold the same unto *W. R. Broughton* from thenceforth for and during all the residue and remainder of the said term of 100 years if *B. Broughton* should so long live and continue incumbent, subject to a proviso for redemption and reassignment of the terms upon payment of 5,500*l.* and interest on 26 November, 1820. *W. R. Broughton* died 17 March, 1821, having by his will and codicil, duly proved in, &c., on &c., appointed the lessors of the plaintiff his executors.

The several deeds mentioned in the case will be in Court, and either party is to be at liberty to refer to them.

The question for the opinion of the Court is, whether the statutes of 13 *Eliz.* c. 20, and 57 *Geo.* 3, c. 29, s. 1, operated so as to vitiate the deed of 26 May, 1820, and preclude the plaintiff, as lessee of *H. D. Broughton* and *D. H. Stow*, from recovering; and generally, whether, under the circumstances stated, he is entitled to recover in this action.

*Thesiger*, for the plaintiff. This case divides itself into three several heads. First, as to the effect of 13th *Eliz.* c. 20. Secondly, as to the extent to which 57 *Geo.* 3, c. 99, operates with regard to that statute. Thirdly, whether the term created by the deed of 10 August, 1811, could be lawfully assigned after the repeal of 43 *Geo.* 3, c. 84. Supposing the term to have been well created when 43 *Geo.* 3, c. 84, was in force, the question will be, whether it is not invalidated by 57 *Geo.* 3, c. 99. If so, the interest remains in the trustees. The objection is, that the transaction was concocted with a view to defeat an act of parliament. The 13 *Eliz.* does not apply to all charges indiscriminately, but to certain indirect dealings between patrons and incumbents. The words of the statute are, "that all leases, gifts, grants, scoffments, conveyances or estates, to be made,

had, done, or suffered by any master and fellows, &c. other than for the term of twenty-one years or three lives, shall be utterly void and of none effect to all intents, constructions and purposes." In Burn's Ecclesiastical Law, title Leases, it is said, that this statute was intended to prevent corrupt bargains between patron and clerk; it being at that time a practice for patrons to get some unworthy clergyman to take institution to their vacant benefices, upon condition of having leases of those benefices made to themselves at very low rates (a). So in *Mouys v. Leake* (b), Lord *Kenyon* says, that the reason of making the act was, that in former times, the patron sometimes presented a needy incumbent, who, being content to take the living on any terms, agreed to grant leases in favour of the patron himself (c). It is probable also, that it was usual to agree that the living should be charged with a pension. The second branch of the statute is directed to this. The provisions of 13 *Eliz.* c. 20, were not, however, found to be sufficient, and another statute was necessary. By 14 *Eliz.* c. 11, s. 15, it was therefore, after reciting "that sundry evilly disposed persons had defrauded the true meaning of the said statute, by bonds and covenants of suffering other persons to enjoy ecclesiastical livings and the fruits thereof, for that such bonds and covenants were not in law taken to be leases, although they indeed amounted to so much," it is enacted, "that all bonds, contracts, promises and covenants

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(a) Vol. i. 656, quarto edit.; vol. ii. 394, octavo edit. citing *Johns*. 131.

(b) 8 T. R. 415.

(c) A similar abuse appears to have prevailed in Spain about two centuries earlier. *Mariana* says, "The Castilian lords, availing themselves of the confusion of the times, had gotten possession of the churches, under the pretence of patronage. They placed and removed at their pleasure hiring

incumbents, to whom they assigned a small portion of the value of the tithes, (una pequeña cota de la renta de los diezmos,) taking the rest for themselves."—*Hist. de Esp.* lib. xviii. cap. 13. The unsettled state of the country, resulting from the introduction of the then spurious, but now legitimate dynasty of *Trastamara*, (*ante*, vol. iii. 199, n.) appears to have been the cause of these irregularities.

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hereafter to be made, for assurance of any lease theretofore made, shall be to all intents and purposes adjudged of such force and validity, and not otherwise, as leases by the same persons made of such benefices and ecclesiastical promotions with cure." With reference to these statutes, the object of the legislature was, not to prevent the impoverishment of the living, but to prevent corrupt dealing between the patron and the incumbent. It may be said on the other side, that the first branch applies to all leases, and that, therefore, the construction to be put on other branches of the statute must be as alleged. It was the intention of the legislature to make non-residence for eighty days conclusive evidence of a corrupt agreement. It may be said, that the words are general, and it is usual to recite particular mischiefs. The answer to that argument is what is said in *Reniger v. Fogassa* (a), that statutes are to be construed according to the minds of the makers, and should extend only to such agreements as they intended. This point has never been decided. It was alluded to in *Doe d. Rogers v. Mears* (b) and *Mouys v. Leake* (c). The former case is referred to in order to get rid of the marginal note in *Mouys v. Leake*, which states broadly, that the grant of a rent charge by a rector or vicar out of his benefice is void by 13 *Eliz.* c. 20; whereas Lord *Kenyon* expressly avoided giving any opinion upon that point. The 14 *Eliz.* was never alluded to. A consideration of this statute would probably have induced the Court to hold the grant valid. It would be good whilst the rector was resident. *Doe v. Mears* was the case of a lease void for non-residence. The Court decided the case upon that point, though the facts invited a decision on the other point. It must be admitted, that the first clause of 13 *Eliz.* c. 20, s. 15, applies to all leases, but the clause that leases should be void as soon as they come to any possession or use, other than for the maintenance of ecclesiastical ministers, is repealed by 14 *Eliz.* c. 11, s. 14. This

(a) Plowd. 10, (by Sanders, Serjt. arguendo.)

(b) Cowp. 129.

(c) 8 T. R. 411.

lease being voidable only, and not void, cannot be avoided by a stranger. *Humphreston's case* (a). The same point was conceded in *Doe d. Cates v. Somerville* (b), in which Co. Litt. 45 a. was referred to, where Lord Coke expressly says, that grants, leases, &c. not warranted by these acts are not void, but good against the lessor, for the statute was made for the benefit of the successor. If that passage had borne out the proposition, there was an end of the question. If the lease were absolutely void, the incumbent might take advantage of it. In *Frogmorton v. Scott* (c) it was held, that the rector himself, and in *Doe v. Barber* (d) that a mere wrong-doer, might take advantage of the non-residence of the lessor. It is therefore, perhaps, too late to contend that the lease is voidable only. But the statute only applies to corrupt dealings with the patron; and the intention of the legislature is to be regarded. [*Parke, J.* The preamble relates to both. *Bayley, J.* The preamble would over-ride all the provisions of the statute. *Parke, J.* You argue that a lease of lands of the value of 500*l* a year for 5*l*. could not be avoided if the lessor were resident.] It must go to that. The second point is as to the extent to which the 57 Geo. 3, c. 92, operates. That act, after reciting the acts of *Henry 8*, and *Elizabeth*, and 44 Geo. 3, repeals so much of those acts as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices; and the question is, whether that part is left subsisting which relates to charging. In one instance, viz. that of 28 *Hen. 8*, c. 13, the statute contains no provisions but what are repealed by 57 Geo. 3, c. 99, although the recital does not in words state that that statute is repealed altogether. [*Bayley, J.* A distinction is made in this very clause between the repeal of the whole and of part of a statute.] The same difficulty occurs with respect to the statute of 14 *Eliz.* c. 20. The words


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(a) 2 Leon. 218.

(b) 6 B. &amp; C. 130.

(c) 2 East, 467.

(d) 2 T. R. 749.

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of the 13 *Eliz.* c. 20, are very extraordinary, treating the rent reserved upon the leases as a charge upon the living. [*Parke, J.* The statute may have meant that the rent, being less advantageous than the possession, would operate as a charge. *Bayley, J.* The 13 *Eliz.* c. 20, relates to leases and also to charges. The 57 *Geo.* 3, repeals only what relates to leases, and leaves the prohibition as to charges in force. In *Doe v. Somerville* it was taken for granted that the statute of *Eliz.* continued as to charges. With respect to the third point, the legality of the assignment, the Court will not look beyond the legal estate. Supposing the term to have been well created, then if *James* had kept it on his own hands it would have been available, notwithstanding the intervening statute. It was competent to *James* to deal with the term as he pleased, and he assigned to the trustees. The estate is in some one, and *James* has assigned all the interest which he possessed. The living is not in a worse situation by reason of the assignment. The validity of the assignment will be presumed. *Doe d. Griffin v. Mason (a)*, *Doe d. Lewis v. Bingham (b)*.]

*Chitty*, contra, was directed by the Court to confine himself to the last point. The annuities were redeemed, and there was a charge by way of mortgage, for money lent for his other occasions, and the assignment is in consideration of 2,000*l.* paid to *James*, 2,000*l.* due to *W. R. Broughton*, and of 1,500 advanced to *B. Broughton*. Of these sums, 3,500*l.* were a new charge upon the living. [*Parke, J.* If the annuities were redeemed, there would in a proper sense be nothing to assign. *James* was supposed to have the whole interest in him.] If the security is void by the statute for a part, it is void in toto. *Robinson v. Bland (c)*. By giving effect to this instrument the object of the statute would be defeated. If the whole estate vested, it would give the mortgagee an advantage by compelling the party to go into

(a) 3 *Campl.* 7.

(b) 4 *B. & A.* 672.

(c) 2 *Burr.* 1080.

equity. The instrument must, therefore, be void in all Courts. It appears by Burn (*d*), that the statute was in furtherance of the canon. If the action had been brought on the demise of *James*, there would have been no answer, because the annuities were not redeemed, and there was no clause of cesser. But if the assignment be void in part, it is void in toto. [*Bayley, J.* That is so when the object of the conveyance is *malum in se*.] The object of the assignment was to afford the means of charging the living, which is *malum in se*. It enables the incumbent to anticipate his revenue; whereas inability to make such an assignment would render the incumbent more prudent, and keep him to his annual income. [*Littledale, J.* Suppose you strip the transaction of the loan by *W. R. Broughton* to *B. Broughton*; *W. R. Broughton* says he is ready to advance the amount required for the purpose of redeeming the annuities, provided he can have security. Then it is a benefit to *B. Broughton* to get rid of the annuities. If that were the whole transaction, could you have impeached it? Surely that could be done.] Here 3,500*l.* more was advanced. It is submitted, that this could not be done, it would be a new charge. [*Bayley, J.* Yet can it be said that the old charge remained except at your option? *Parke, J.* You say the intention of the parties was to convert the annuity into a mortgage, and that the assignment is invalid, because the object was to support a charge void by the act. But the charge is entirely in a new shape, a mortgage instead of an annuity.]

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*Thesiger*, in reply. In one of two ways the plaintiff is entitled. The annuities were either kept alive or redeemed. If they were not redeemed, it is admitted that they were a valid charge upon the living. If they are redeemed, the plaintiff is clearly entitled, because he so far discharged the living. It is said, that the addition of the 3,500*l.* makes all the difference. In the late cases collected in the note to

(a) Burn's Eccl. Law.

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*Butler v. Wigge* (a) it is settled that, unless the act expressly declares that all securities and instruments which contain matters contrary to the act shall be absolutely void, so much only of such securities and instruments as is contrary to the act will be avoided, and the rest will stand good. [Bayley, J. In *Greenwood v. The Bishop of London* (b) it was held, that as the statutes contained no express provision for avoiding simoniacal conveyances, they are left to the operation of the common law, which will reject the illegal part, and leave the rest untouched if they can be fairly separated. Suppose no further advance of money had taken place; by converting the security into a mortgage payable at a certain time, the mortgagee might take the whole. *Littledale, J.* It is quite clear that the 2000*l.* could not be raised by way of mortgage; the only question is, whether the term could be assigned as if it had been assigned in consideration of 5*s.*, and no more. An assignment of the whole estate entitles the lessors of the plaintiff to have the profits to the same extent that the assignor could have taken them, and only kept alive so much of the charge as the annuity would extend to. It is incumbent on the defendant to show that there was no memorial. The legal estate was in *James*, and could not be got out of him without going into a court of equity.

*Cur. adv. vult.*

The judgment of the Court was now given by

BAYLEY, J., who, after stating the facts of the case, proceeded thus: Three annuities, amounting together to 299*l.* 7*s.*, were charged upon this rectory during a period when the statute of 13 *Eliz.* c. 20 stood repealed by 43 *Geo.* 3, c. 84. Before the execution of the deed of 26 May, 1820, the 43 *Geo.* 3, c. 84, and part of the 13 *Eliz.* c. 20, were repealed by 57 *Geo.* 3, c. 99, the effect of which latter enactment was to remove so much of the statute of *Eliz.* as was not again

(a) 1 Wms. Saund. 66, (d). (b) 5 Taunton, 727; 1 Marshall, 292.

repealed by 57 Geo. 3, c. 99. If the deed of 1820 had simply created a new charge upon the rectory, it would have been necessary to determine whether the statute of *Eliz.* applied to annuities granted for a valuable consideration<sup>(a)</sup>. But here, so far as concerns the assignment of the term upon which the title of the lessors of the plaintiff stands, no new charge is created. It was an assignment of the rectory by *James*, confirmed by *B. Broughton*, and accompanied with an assignment by *James* of the purchase moneys of the three annuities; the amount of which was afterwards to remain at five per cent. If the term constituted a valid security for the annuities, it would be equally so for the common interest of five per cent. which has been substituted for the annuity interest. By the assignment, which to this extent is merely a continuation of the old charge, the legal estate passed to *W. R. Broughton*, whose executors are therefore entitled to maintain this ejectment.

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Judgment for the plaintiff.

(a) That question has since been decided in the affirmative. See *Shaw v. Pritchard*, *post*.

TAYLOR, Gent., one, &c. v. WATSON and another, Gents., two, &c.

**ASSUMPSIT.** The first count of the declaration stated, that before and at the time of the making of the promise &c. a certain suit had been prosecuted and was then pending in the King's Bench, in which *Duncan Graham* was plaintiff, and *William Chrystie* and *Simon Taylor* were defendants, and wherein the said *D. Graham* had impleaded the said *W. Chrystie* and *S. Taylor* on certain promises and undertakings of the said *W. Chrystie* and *S. Taylor*, to recover a certain large sum of money, to wit, 165*l.* 13*s.* 5*d.* due from the said *W. Chrystie* and *S. Taylor* to the said *D. Graham*; in which suit, during all the time aforesaid, *Taylor*, the now plaintiff, was attorney for the said *D. Graham*,  
An undertaking to pay the costs of the plaintiff's attorney in an action still pending, in consideration that the plaintiff will, with the consent of that attorney, give an authority to the defendant to pay over the debt sued for to a creditor of the plaintiff, is not binding.



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And whereas also, during all the time aforesaid, said *D. Graham* was indebted and liable in a certain other large sum of money, to wit, 648*l.* 17*s.* 3*d.* to, amongst divers other persons, one *James Goodall*: And thereupon heretofore, to wit, 5 March, 1827, at &c. in consideration that said *D. Graham*, at the special instance &c. of defendants, would, with the consent of plaintiff, as such attorney for said *D. Graham*, give an authority for said *W. Chrystie* and *S. Taylor* to pay the said sum of money, to wit, 165*l.* 13*s.* 5*d.* to the said *J. Goodall*, they defendants undertook &c. that they would pay to plaintiff the amount of his costs in the said suit. Averment, that afterwards, to wit, on &c. at &c. said *D. Graham*, confiding in the said promise &c. did, with the consent of plaintiff, give an authority to said *W. Chrystie* and *S. Taylor* to pay said sum of money, to wit, 165*l.* 13*s.* 5*d.* to the said *J. Goodall*, whereof the defendants then and there had notice. Averment, that plaintiff's costs in the said suit then and there amounted to a large sum of money, to wit, 60*l.* whereof defendants afterwards, to wit, on &c. at &c. had notice. No averment of non-payment (a).

The second count, after the same introductory matter, stated, that in consideration that *D. Graham* would give authority to *W. Chrystie* and *S. Taylor* to pay said sum, to wit, of 165*l.* 13*s.* 5*d.* to *J. Goodall*, they the defendants undertook &c. that they would pay to plaintiff the amount of his costs in the said suit. Averment, that afterwards, to wit, on &c., at &c., the said *D. Graham* did give authority to the said *W. Chrystie* and *S. Taylor* to pay the said sum of money, to wit, 165*l.* 13*s.* 5*d.* to said *J. Goodall*, whereof the defendants then and there had notice. Averment, that plaintiff's costs in the said suit then and there amounted to a large sum of money, to wit, 60*l.*, whereof defendant afterwards, to wit, on &c. at &c. had notice. Yet defendants, not regarding &c., have not as yet paid to plaintiff

(a) *Vide post*, 267.

the said sums of money, his said costs, or any part thereof, but have wholly refused so to do.

The third count, after the same introductory matter, went on to allege, that defendants, before and at the time of the making of the promise &c. hereinafter mentioned, were attorneys for the said *J. Goodall*: And thereupon heretofore, to wit, 5 March, 1827, at &c., in consideration that *D. Graham*, at the special instance &c. of defendants, would give an authority for *W. Chrystie* and *S. Taylor* to pay the said sum of money, to wit, 165*l.* 13*s.* 5*d.* to said *J. Goodall*, they, defendants, undertook &c. that they would procure plaintiff's costs in the said suit to be paid to him. Averment, that afterwards, to wit, on &c., at &c., *D. Graham*, confiding in the said last-mentioned promise &c., did give an authority for *W. Chrystie* and *S. Taylor* to pay the said sum of money, to wit, 165*l.* 13*s.* 5*d.* to the said *J. Goodall*, whereof defendants then and there had notice. Averment, that plaintiff's costs in the said suit amounted to a large sum of money, to wit, 60*l.*, whereof defendant afterwards, to wit, on &c., at &c., had notice: Yet defendants, although often requested, have not as yet procured plaintiff's costs in the said suit to be paid to him, but have wholly refused so to do; and the same remain and are unpaid and unsatisfied to him, to wit, at &c.

The fourth count, after the same introductory matter as the third, stated, that in consideration that *D. Graham*, at the special instance &c. of defendants, would give authority to *W. Chrystie* and *S. Taylor* to pay the said sum, to wit, 165*l.* 13*s.* 5*d.* to the said *J. Goodall*, defendants undertook &c. that they would not accept the same but on payment to plaintiff of his costs in the said suit as such attorney for the said *D. Graham*. Averment, that afterwards, to wit, on &c., at &c., the said *D. Graham*, confiding in the said promise &c., did give authority to the said *W. Chrystie* and *S. Taylor* to pay the said sum of money, to wit, 165*l.* 13*s.* 5*d.* to the said *J. Goodall*. Averment, that the said costs in the said suit amounted to a large sum of money, to wit, 60*l.*,

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whereof defendants then and there had notice: Yet defendants, not regarding &c., did afterwards, to wit, on &c., at &c., accept and receive the said authority of the said *D. Graham*, without payment to plaintiff of his said costs, and then and there used and employed the same; and by reason thereof, afterwards, to wit, on &c., at &c., the said *J. Goodall* received of the said *W. Chrystie* and *S. Taylor*, who then and there thereby paid the said *J. Goodall* the said sum of money, to wit, 165*l.* 13*s.* 5*d.*, to wit, at &c., and the said costs of plaintiff remain and are unpaid and unsatisfied, and defendants have not paid to plaintiff his said costs, nor hath said *J. Goodall* paid the same: But defendants and said *J. Goodall* have wholly refused so to do, to wit, at &c.

The declaration contained also counts for work and labour and business done as an attorney, and the money counts.

Special demurrer to the first four counts of the declaration, assigning for causes that the several supposed promises and undertakings in those counts respectively mentioned do not, nor do any nor does either of them appear to be founded upon any consideration moving from plaintiff to defendants, but appear to have been made to plaintiff by defendants, if at all, without any good, adequate, or sufficient consideration whatever, and to be naked agreements. And also for that it is not stated or alleged in or by those counts respectively, or either of them, that plaintiff had any or what right to the said several sums of 165*l.* 13*s.* 5*d.* in those counts respectively mentioned, or any or either of them, or that he had any right or authority to prevent the said *D. Graham* from giving authority to the said *W. Chrystie* and *S. Taylor* to pay the said sums of 165*l.* 13*s.* 5*d.* in those counts respectively mentioned, or any or either of them, to the said *J. Goodall*; nor does it appear that plaintiff had recovered any judgment or judgments in the said actions in the said first, second, third, and fourth counts mentioned to have been commenced by the said *D. Gra-*

*ham* against said *W. Chrystie* and *S. Taylor*, or in either of them, or that plaintiff had given any notice to the said *W. Chrystie* and *S. Taylor* not to pay over said several sums of 165*l.* 13*s.* 5*d.*, or either of them, to the said *D. Graham* or the said *J. Goodall*, or to any person or persons other than plaintiff, as the attorney in the action in those counts respectively mentioned; and also for that it does not appear in or by said counts, or either of them, that plaintiff had any lien upon or right to the said costs. Joinder in demurrer.

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*Patteson*, in support of the demurrer. To maintain an *assumpsit* there must be a consideration moving from the plaintiff. This rule is laid down by Mr. *Selwyn* (a), and supported by a reference to *Bourne v. Mason* (b), and *Crow v. Rogers* (c). In those cases it was held that a party could not sue upon the promise who was not a party to the consideration. Here it is not alleged that the promise was made in consideration of any thing done or relinquished by the plaintiff. The first count seems to be the only one with which the defendant need grapple. In that count it is alleged that the authority was to be given at the request of the defendants. It seems as if the plaintiff had a right to prevent the money from being paid over, and that he had relinquished that right in favour of the defendants; but it does not amount even to that. It is no where averred that the plaintiff had any right to prevent *Graham* from authorising defendants in that action to pay the money over. It may be admitted that an attorney has a lien upon the judgment for his costs, and that if the money be paid in fraud of that lien, he will be allowed to proceed for his costs. [*Parke*, J. It does not appear that any costs were due.] It may be said, that before judgment, if the attorney gives notice to the adverse party not to settle without securing his costs already incurred, he may have a right to proceed in the action for the purpose of recovering them. No doubt if defendant and plaintiff had colluded,

(a) *Selw. N. P.* 7th edit. 52. (b) 1 *Ventr.* 6. (c) 1 *Str.* 592.

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the attorney might have gone on; but there does not appear to be any case where a *bonâ fide* payment, though after notice, has been held to be improperly made. Here it is not even pretended that notice was given. The plaintiff ought to have put himself in that situation that he had tied up *Chrystie* and *Taylor* from paying the money to *Graham* without the consent of the plaintiff. The count shews no detriment to the plaintiff, nor any benefit whatever derived from the act of plaintiff. It is not stated that plaintiff had any lien against his own client for costs. It does not appear that plaintiff might have gone on for costs against *Graham*, or that he relinquished any right. It is not stated that he had any right to prevent the money from getting into the hands of *Goodall*, or that he relinquished such right, [*Bayley, J.* There is nothing to shew that the authority is effectual. *Chrystie* and *Taylor* never bound themselves to accede to the authority.] The second count is in the same situation. The fourth count states the promise to be, that the defendants would not accept the 165*l.* 13*s.* 5*d.*, but upon payment to plaintiff of his costs. This count, however, does aver that defendants were attorneys of *Goodall*, and that the authority was acted upon; but the vice of that count is, that the consideration is there laid ill.

*Campbell, contra.* If it appear that the plaintiff had a lien on the money, there is a sufficient consideration and promise. A lien belongs to an attorney upon all money recovered or to be recovered by him. The Court will take notice that an attorney has a lien to this extent, and this being a point of law, it was not necessary to allege in the declaration that the plaintiff had a lien, or that he had waived it. The question as to the personal liability of an attorney upon such a promise as this does not arise (*a*).

(*a*) As to which see *Appleton v. Conington*, 2 D. & R. 307; 1 B. Banks, 5 East, 148; *Burrell v. & C.* 160; *Scrace v. Whittington*, Jones, 3 B. & A. 47; *Iveson v.* 3 D. & R. 195; 2 B. & C. 11.

The plaintiff had brought an action for 165*l.* 13*s.* 5*d.*, and that sum clearly appears to have been due. The law raises the debt, and will not presume it satisfied. [Bayley, J. Has an attorney any lien until the money is recovered and in his hands?] In *Read v. Dupper* (a) it was held that the defendant could not pay over the debt to the plaintiff after notice from the plaintiff's attorney not to do so, even where no fraud could be charged. In *Drinkwater v. Goodwin* (b) it was held that a factor had a lien. [Parke, J. He made the contract. In this case the plaintiff does not give up his claim against *Graham* or upon the money.] As matters stood before this contract was entered into, the plaintiff might have resorted to his own client, and had a chance of obtaining payment out of the sum to be recovered. It was not, strictly speaking, a lien, because there was no possession. It was the chance of recovering money, and of repaying himself out of that money, when the lien should have accrued. The question is, whether a waiver of that advantage is a sufficient consideration to support the promise. That is implied in the terms of the question. It is immaterial whether the promissor derives any benefit from the consideration. The lien would attach if the money were paid in the course of a suit. [Bayley, J. There is nothing to shew that the plaintiff's right to call upon *Graham* has been impeached, or to shew that *Graham* is insolvent.] The giving up of the security is sufficient. The moment the authority was given, with the plaintiff's assent, he had no longer any claim upon the 165*l.* 13*s.* 5*d.* He could only look to *Graham*, his own client. [Parke, J. In *Read v. Dupper* there was a judgment. Before judgment could the attorney prevent the defendant, by a notice, from paying the debt to a solvent plaintiff? My impression is, that there must be fraud, a settlement with the knowledge that no part of the money will reach the attorney. Where there is no fraud you may compromise and receive the money. Bayley, J. If *Graham* had thought fit

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(a) 6 T. R. 361.

(b) Cowp. 256.

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he might have entered into an arrangement in the original action. Even in the Common Pleas, where the practice is rather different upon this point, the Court will not interfere, except in cases of fraud.] The question is, whether, after the authority had been given, the plaintiff was equally secure as before. He is now confined to *Graham*, and may lose his costs altogether. Then there is sufficient performance averred. The plaintiff did give his assent to the authority. It is immaterial whether the authority was acquiesced in by *Chrystie* and *Taylor*, because it would authorise them, if they chose to act upon it; and the chance of its being acted upon is sufficient. [*Bayley, J.* Unless *Chrystie* and *Taylor* consented to pay over the money to *Goodall*, the parties remain as they were. If the authority was not acted on, it is useless. Upon this count the right seems still to remain as perfect as ever. *Parke, J.* You say that *Graham* is prejudiced, and that thereby you are injured.] The plaintiff is no longer in the same situation. There was nothing to prejudice his interposition before. [*Parke, J.* The other counts are much more difficult to support than the first. There is nothing moving from plaintiff. The plaintiff must confer a benefit, or suffer detriment.]

*Patteson*, in reply. The injury is of the minutest quality, if any. [*Parke, J.* The question is, whether giving up a remote chance is a sufficient consideration.] The consideration ought to be alleged with complete accuracy. Then it is not alleged that the consent of the plaintiff was given at request of defendant. [*Parke, J.* Suppose the promise had been laid to be in consideration plaintiff would consent.] It might have run, that in consideration plaintiff, at request of defendants, had consented that *Graham* should do so and so. But even then there ought to appear something for which a consent is necessary. It is not so shewn. If it had been said that *Graham* was unable to pay, and that notice had been given, it would have been within one of

the cases (a). The plaintiff might have said, that in consideration he had forborne to give notice, defendants promised. There is no distinct averment that plaintiff ever waived his chance. The declaration ought to shew that plaintiff agreed to sustain detriment, and that he did sustain detriment. There is nothing to shew that any detriment was sustained. The plaintiff may still have a right to proceed to judgment against *Chrystie* and *Taylor* in the name of *Graham*. The first count contains no allegation of non-payment. [*Parke, J.* That omission is not assigned as ground of special demurrer, and therefore the demurrer must be considered in that respect as general. If this is a consideration, it is the least that ever was put into a declaration. If the situation of the parties is altered, it is by the act of third persons, over whom the plaintiff has no controul.]

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At a subsequent day the Court intimated an opinion that the declaration could not be supported; and *Parke, J.*, observed, that the alleged consent to the payment of the money to *Goodall* was void, as the act might have been done without his consent.

Upon this opinion being intimated, the plaintiff prayed for leave to amend the declaration, which was granted (b).

Leave to amend, on payment of costs.

(a) *Read v. Dupper*, ante, 265.

(b) Before argument leave may be obtained to amend, as matter of course; but where the party has chosen to proceed with the argument, and take the chance of the decision's being in his favour, an amendment is matter of indul-

gence. This indulgence, however, is rarely refused, where the point raised by the demurrer is either new or difficult, unless an intimation of the necessity of amending has previously been thrown out and disregarded.



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Lands of which *A.* is mortgagee in fee will not pass under a general devise of all *A.*'s lands, if the devise be subject to uses which *A.* was not entitled to declare in respect of the mortgaged lands.

A bequest by *A.* to *B.*, his executors, administrators, and assigns, of *A.*'s stock in trade, ready money, and securities for money, debts, personal estates and effects, will not carry *A.*'s legal estate in a mortgage in fee, although a trust be declared that *B.*, his heirs, executors, administrators and assigns, shall invest the produce thereof, and of *A.*'s real estates, (devised to *B.* by a separate clause, which does not affect the mortgaged property) in the purchase of land, to be conveyed to certain uses in strict settlement.

**REPLEVIN.** The defendant made cognizance as bailiff of one *Alsop*, for 189*l.*, for one half year's rent of a house held by plaintiff under *Alsop*. Plea, non tenuit modo et formâ. At the trial before *Park, J.* at the spring assizes for the county of Hereford, 1828, the following facts appeared :—

In 1802, the plaintiff's landlord conveyed the premises by way of mortgage to *Nightingale* in fee, who, by his will, dated 6 May, 1803, charged his real estates with the payment of certain annuities and legacies, and subject thereto, devised all his messuages, lands, tenements and hereditaments to *Toplis, Saxton* and *Alsop*, their heirs and assigns, until *W. E. Shore* should attain twenty-one, with limitations over in case *Shore* should die before he attained that age without male issue; in trust that *Toplis, Saxton* and *Alsop*, or the heirs or assigns of the survivor, should apply and dispose of the rents and profits as therein expressed; but with a discretionary power to the trustees to sell certain parts of their real estate not embracing the premises in question. And he thereby devised to *Shore*, when he should have attained twenty-one, all his messuages, &c. for life, with remainder to trustees to preserve contingent remainders; remainder to his first and other sons, in strict settlement, with remainders over. He then bequeathed all his stock in trade, cotton mill, &c., securities for money, debts, and other personal estates, to *Toplis Saxton*, and *Alsop*, their executors, administrators and assigns, upon trust, that *Toplis, Saxton* and *Alsop*, or the heirs, executors, administrators, or assigns, of the survivor, should sell and dispose of the said stock in trade, cotton mill, and personal estates and effects, and collect his debts, and invest the same in the purchase of freehold lands in England, or in the United States of America, or to procure the same to be conveyed to such uses, and for such estates as were therein before limited, of his messuages, lands, tenements and here-

ditaments therein before devised for the term or time; and upon the trusts aforesaid, except the power of sale. *Nightingale's* death took place in June, 1808, and was soon followed by that of *Toplis* and *Saxton*. The rent at the time of the mortgage was 250*l.* but was afterwards raised by the mortgagor to 378*l.* Neither *Nightingale*, nor either of the executors and devisees, ever received rent from the plaintiff; but in August, 1826, before the rent distrained for became due, *Alsop* gave the plaintiff notice of the mortgage, &c., and required that the rent then due(a), and that which would thereafter accrue, should be paid to himself. For the plaintiff it was objected, that the legal estate in the mortgaged premises did not pass by the devise, which contemplated the passing of interests which the devisor had full right to limit and control as he pleased; and that as the holding at 378*l.* per annum had been created subsequently to the mortgage, the mortgagee could only distrain for the original rent, which alone was incident to the reversion assigned to him. The learned Judge was of opinion, that the estate in mortgage passed under the general words "all my messuages, lands, tenements and hereditaments," and that the devisee of the mortgage was entitled to adopt the new term of the demise to the plaintiff. A verdict having been found for the defendant,

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*Russell*, Serjt., in Easter term last, moved for a rule nisi, for a new trial, and in support of the first objection cited *Morgan* ex parte(b), and *Lord Braybroke v. Inskip* (c), there referred to by Lord *Eldon* in giving judgment. Upon the second point, he urged that the mortgagee could not sue upon the contract of the mortgagor subsequent to the execution of the mortgage. Even the notice given to the plaintiff by *Alsop* required the plaintiff to pay rent at the rate of 250*l.* per annum; and the only evidence to support the claim for rent at the rate of 378*l.* was that plaintiff had said that he

(a) *Et vide ante*, iii. 109, n.

(c) 8 Ves. 417.

(b) 10 Ves. 101.

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March, anno 1619, the said *Peter Key*, by his will in writing, gave to *Robert Key* all his goods, monies, bills or bonds, *mortgages or specialities for monies*, and made him his executor and died; and that the 150*l.* not being paid, *Robert Key* entered and let to the plaintiff; and without argument, the opinion of the Court was, that these words 'all my mortgages' made a good devise of the lands mortgaged; whereupon judgment was given for the plaintiff." For this purpose the estate in the land is the same thing as the money secured by it. *Silberschildt v. Schiott* (a). Here the devise is not as in *Wilkinson v. Merryland* (b), *Strong v. Teutt* (c), *Roe d. Reade v. Reade* (d), *Morgan, ex parte* (e), subjected to any charge which the party had no right to impose upon property in which he had not the entire beneficial interest. On the other hand, it cannot be supposed to have been the intention of the testator, when he was giving to his executors and trustees the fullest controul over his property, to exclude them from the means of enforcing the payment of the debt by distress upon the tenant during the continuance of the plaintiff's interest, or by an ejectment after it should be determined.

*Russell*, Serjt., and *E. V. Williams*, contrà. The right to distrain is claimed in respect of the inheritance; and in this the mortgagee had only a bare trust estate, which it cannot be supposed the testator meant to devise, and of the existence of which he was, in all probability, ignorant; otherwise he would not have used words sufficiently large to embrace this trust estate when making a provision for his family in the form of a strict settlement. It is said, that the estate passed under the words "securities for moneys." No authority is cited in support of this position, except the anomalous case of *Crips v. Grysil*. There, however, we find the word "mortgages," which may, perhaps, have been understood to mean the mortgage tenures. Here

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(a) 3 V. &amp; B. 49.

(d) 8 T. R. 118.

(b) Cro. Car. 447, 449.

(e) 10 Ves. 101.

(c) 1 W. Bla. 201.

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the words are used in connexion with tools, utensils, ready money and personal estate, which plainly shews that the word "securities" is used in the popular sense of written documents. And even the word "mortgages" would not, when found in such company, be construed to extend to the estate in the land. *Tilley v. Simpson* (a). *Crips v. Grysil* is a singular case, and is irreconcilable with *Wilkinson v. Merryland* (b) which was decided a few years after *Martin*

(a) 2 T. R. 659, n.

(b) Cro. Car. 447, ibid. 449, W. Jones, 380, S. C. The principal difference between the two cases in Croke seems to be, that in *Crips v. Grysil* the mortgage had not become absolute at the time of the devise, whereas in *Wilkinson v. Merryland* the mortgage is stated to have been forfeited. In the latter case, the testator had the whole legal estate, subject to an equity of redemption in the mortgagor, which equity constituted the mortgagee a trustee for the mortgagor; but in *Crips v. Grysil* the testator had even at law merely a defeasible fee, the mortgagor having, at the time of the devise, still five years left in which to exercise his option of redeeming his land or not. This distinction seems to reconcile the two cases even without the aid of the concluding sentence of *Key's* will, which indeed in this view of the case would be immaterial, and may have been intentionally omitted by this most learned and excellent reporter, as forming no part of the ground of decision. In *Crips v. Grysil*, it may, perhaps, have been considered that if the word "mortgages" did not pass the land, and the mortgagor had refused to exercise the power of redeeming, the bequest might have been ren-

dered wholly nugatory, as the mortgagor might have elected to keep the money, and the land would have belonged to the heir of the mortgagee. And see Anon. P. 6 *Elis.* F. Moore, 58, 59.

In modern mortgages, or rather in the instruments commonly so denominated, (*ante*, iii. 108,) there is usually a covenant by the mortgagor to repay the sum advanced by the mortgagee, without giving the former an option between the land and the money.

In *Wilkinson v. Merryland*, the Court merely determined that no fee passed to the legatee of the mortgage who had entered and devised to the defendant in fee. The Court say (*ibid.* 450) "But the greater question would have been, whether an estate for life had passed to the wife, if she had been alive, because it is coupled only with personal things, as goods, leases, estates, mortgages, debts, &c., which may be intended that he meant only but estate for years, or mortgages for years; and so much the rather by reason of the words whereof I am possessed. And *Berkeley* (who was absent the day before) concurred in opinion, for the heir shall not be disinherited, nor the fee passed away without an apparent intent

v. *Mowlin* (a), and been cited for the sake of a mere extrajudicial dictum, which is supposed to have fallen from Lord *Mansfield*. *Silberschildt v. Schiott* (b) is also a mere dictum, contradicted by *Duke of Leeds v. Munday* (c), *Silvester*

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out of the words of the will. And in this case it doth not appear that he intended to pass but such things whereof he is possessed, which extend only to things personal, or leases whereof he is possessed, and not to freehold, whereof he is said in law to be seised; and peradventure, he was not possessed of this land, for it is not found that the mortgagee entered and was in possession. And commonly in mortgages, the mortgagor retains the possession until the mortgagee enters for a forfeiture; wherefore it was appointed, that judgment should be entered for the plaintiff. But they agreed if he had devised all estate in such land, or had mentioned that he had such land mortgaged in fee, and devised his mortgage, the fee had passed.

Sir W. Jones, who reports the case very shortly, says, "The question was, whether the wife had the mortgaged land devised to her, and if she had, whether she had the fee or not, and the opinion of the Court was, that at least she had but for life."

If, indeed, it had been found by the special verdict, as appearing upon the face of the indenture or otherwise, that the mortgage was intended as a mere security for money, the words "securities for money," or even the word "mortgage," in the bequest, might have been satisfied by giving the legatee the debt and the lien upon the

land in the seisin of the heir of the mortgagee.

(a) 2 Burr. 969. Of this case, Serjt. *Hill* says, "This is too clear a case to deserve a report." The language of Lord *Mansfield* is however very strong, "A mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow, notwithstanding the Statute of Frauds."

To this, Mr. Serjt. *Hill* has added the following note: "This is true in equity, but seems not to be so as to the legal estate, though the estate were freehold; and clearly so, if copyhold. See Cas. Temp. Hardw. 401; 7 Vin. 156; Cro. Car. 447, 449; 2 Atk. 102; 8 Vin. 207. pl. 14, 15; Eq. Abr. 178, ca. 19; ib. 211, ca. 20, 21; 2 Ld. Raym. 834; 2 Ch. Cas. 51; 1 Vern. 4; 3 Ch. Rep. 187; 2 Vern. 625; 2 Atk. 605."

(b) 3 V. & B 49.

(c) 3 Ves. 348.

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v. *Jarman* (a), and *Horsfall*, ex parte (b), which show, that by a bequest of the mortgage debt, the legal interest in the mortgaged land does not pass.

*Cur. adv. vult.*

BAYLEY, J., now delivered the judgment of the Court, and after stating the pleadings, proceeded thus:—Two clauses in the will were at different times relied upon as passing the house, &c. on which the distress was taken; the former containing terms sufficiently large to include the premises in question, but accompanied with words limiting the property which was the subject of that clause in strict settlement, and otherwise in a manner only applicable to estates over which the party has the absolute ownership. Upon this ground, we are of opinion that the property did not pass under that clause. In another part of the will is found a bequest of all the testator's stock in trade and utensils, ready money, and securities for money, debts, personal estate and effects; and it was insisted that under the words securities for money, this property would pass to the devisee. No words of inheritance are used with reference to this bequest, but the testator directed that the trustees or the heirs, executors, administrators or assigns of the survivor should dispose of his personal estate; and for some time the Court had a strong impression that from the use of the word "heirs," they might consider the mortgage in fee as passing under the words "securities for money," it being supposed that otherwise the word "heirs" would have had nothing to operate upon; but on looking further into the will, it will be seen that the property given to the trustees in the first clause in the will, was given to them their heirs and assigns; and that during the infancy of *Shore*, they were to appropriate the rents and profits to particular uses; and the word heirs in the second clause may apply to the control which the trustees, their heirs and


(a) 10 Price, 76.

(b) M'Clelland and Younge, 292.

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assigns would have over the property during that period. We are, therefore, of opinion, that from this use of the word heirs, it cannot be inferred that the testator meant to pass his estate of inheritance in the mortgage property. Then the case stands upon the effect of the second devise generally; upon which it is the opinion of the Court that the words are insufficient to pass the testator's interest. The general rule is, that you must first have words sufficient to pass the mortgage property; secondly, that it must not be limited to uses inapplicable to such property. This rule excludes the first clause, and we think that the words used in the second clause are inapplicable. *Crips v. Grysil* was relied on for the defendant. The words in that case very much resemble those which occur here; but upon inspecting the record of the special verdict, it appears that the will contained words which go much further than those which the reporter has extracted. The report mentions a bequest of goods, chattels, mortgages and securities for money; but the words of the will as set out in the special verdict are: "In the name of God, Amen.—The rest of my goods not bequeathed, (the will containing no previous disposition of any thing whatever,) my money bills or bondes, *morgages or specialties for money*, I doe give unto *Robert Kay* my sonne, and I doe make him my full and sole executor, yea, and alsoe my heire of this freehold, whilst it please God by him or his heire male he keepe it in the surname of *Kaye*; and for want of heire male by my sonne *Robert Kaye*, after his death, that is, *Robert* my sonne, if *Robert Kaye* my grandson be liveinge and have heire male, and the other *Robert* dead and leave noe heire male, then this freehold to *Robert* my grandsonne and his heires." It does not appear by the special verdict, that the testator had any property to which the expression, "I do make him my heir of this freehold" could apply, except the lands mortgaged to him in fee. It is true that the testator afterwards limits that freehold to *Robert Kaye* in tail male, with remainder to another *Robert Kaye* also in tail



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he might have entered into an arrangement in the original action. Even in the Common Pleas, where the practice is rather different upon this point, the Court will not interfere, except in cases of fraud.] The question is, whether, after the authority had been given, the plaintiff was equally secure as before. He is now confined to *Graham*, and may lose his costs altogether. Then there is sufficient performance averred. The plaintiff did give his assent to the authority. It is immaterial whether the authority was acquiesced in by *Chrystie* and *Taylor*, because it would authorise them, if they chose to act upon it; and the chance of its being acted upon is sufficient. [*Bayley, J.* Unless *Chrystie* and *Taylor* consented to pay over the money to *Goodall*, the parties remain as they were. If the authority was not acted on, it is useless. Upon this count the right seems still to remain as perfect as ever. *Parke, J.* You say that *Graham* is prejudiced, and that thereby you are injured.] The plaintiff is no longer in the same situation. There was nothing to prejudice his interposition before. [*Parke, J.* The other counts are much more difficult to support than the first. There is nothing moving from plaintiff. The plaintiff must confer a benefit, or suffer detriment.]

*Patteson*, in reply. The injury is of the minutest quality, if any. [*Parke, J.* The question is, whether giving up a remote chance is a sufficient consideration.] The consideration ought to be alleged with complete accuracy. Then it is not alleged that the consent of the plaintiff was given at request of defendant. [*Parke, J.* Suppose the promise had been laid to be in consideration plaintiff would consent.] It might have run, that in consideration plaintiff, at request of defendants, had consented that *Graham* should do so and so. But even then there ought to appear something for which a consent is necessary. It is not so shewn. If it had been said that *Graham* was unable to pay, and that notice had been given, it would have been within one of

the cases (a). The plaintiff might have said, that in consideration he had forborne to give notice, defendants promised. There is no distinct averment that plaintiff ever waived his chance. The declaration ought to shew that plaintiff agreed to sustain detriment, and that he did sustain detriment. There is nothing to shew that any detriment was sustained. The plaintiff may still have a right to proceed to judgment against *Chrystie* and *Taylor* in the name of *Graham*. The first count contains no allegation of non-payment. [*Parke*, J. That omission is not assigned as ground of special demurrer, and therefore the demurrer must be considered in that respect as general. If this is a consideration, it is the least that ever was put into a declaration. If the situation of the parties is altered, it is by the act of third persons, over whom the plaintiff has no controul.]

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At a subsequent day the Court intimated an opinion that the declaration could not be supported; and *Parke*, J., observed, that the alleged consent to the payment of the money to *Goodall* was void, as the act might have been done without his consent.

Upon this opinion being intimated, the plaintiff prayed for leave to amend the declaration, which was granted (b).

Leave to amend, on payment of costs.

(a) *Read v. Dupper*, ante, 265.

(b) Before argument leave may be obtained to amend, as matter of course; but where the party has chosen to proceed with the argument, and take the chance of the decision's being in his favour, an amendment is matter of indul-

gence. This indulgence, however, is rarely refused, where the point raised by the demurrer is either new or difficult, unless an intimation of the necessity of amending has previously been thrown out and disregarded.



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## GALLIERS v. MOSS.

Lands of which *A.* is mortgagee in fee will not pass under a general devise of all *A.*'s lands, if the devise be subject to uses which *A.* was not entitled to declare in respect of the mortgaged lands.

A bequest by *A.* to *B.*, his executors, administrators, and assigns, of *A.*'s stock in trade, ready money, and securities for money, debts, personal estates and effects, will not carry *A.*'s legal estate in a mortgage in fee, although a trust be declared that *B.*, his heirs, executors, administrators and assigns, shall invest the produce thereof, and of *A.*'s real estates, (devised to *B.* by a separate clause, which does not affect the mortgaged property) in the purchase of land, to be conveyed to certain uses in strict settlement.

**REPLEVIN.** The defendant made cognizance as bailiff of one *Alsop*, for 189*l.*, for one half year's rent of a house held by plaintiff under *Alsop*. Plea, non tenuit modo et formâ. At the trial before *Park, J.* at the spring assizes for the county of Hereford, 1828, the following facts appeared :—

In 1802, the plaintiff's landlord conveyed the premises by way of mortgage to *Nightingale* in fee, who, by his will, dated 6 May, 1803, charged his real estates with the payment of certain annuities and legacies, and subject thereto, devised all his messuages, lands, tenements and hereditaments to *Toplis, Saxton* and *Alsop*, their heirs and assigns, until *W. E. Shore* should attain twenty-one, with limitations over in case *Shore* should die before he attained that age without male issue; in trust that *Toplis, Saxton* and *Alsop*, or the heirs or assigns of the survivor, should apply and dispose of the rents and profits as therein expressed; but with a discretionary power to the trustees to sell certain parts of their real estate not embracing the premises in question. And he thereby devised to *Shore*, when he should have attained twenty-one, all his messuages, &c. for life, with remainder to trustees to preserve contingent remainders; remainder to his first and other sons, in strict settlement, with remainders over. He then bequeathed all his stock in trade, cotton mill, &c., securities for money, debts, and other personal estates, to *Toplis Saxton*, and *Alsop*, their executors, administrators and assigns, upon trust, that *Toplis, Saxton* and *Alsop*, or the heirs, executors, administrators, or assigns, of the survivor, should sell and dispose of the said stock in trade, cotton mill, and personal estates and effects, and collect his debts, and invest the same in the purchase of freehold lands in England, or in the United States of America, or to procure the same to be conveyed to such uses, and for such estates as were therein before limited, of his messuages, lands, tenements and here-

ditaments therein before devised for the term or time; and upon the trusts aforesaid, except the power of sale. *Nightingale's* death took place in June, 1808, and was soon followed by that of *Toplis* and *Saxton*. The rent at the time of the mortgage was 250*l.* but was afterwards raised by the mortgagor to 378*l.* Neither *Nightingale*, nor either of the executors and devisees, ever received rent from the plaintiff; but in August, 1826, before the rent distrained for became due, *Alsop* gave the plaintiff notice of the mortgage, &c., and required that the rent then due(a), and that which would thereafter accrue, should be paid to himself. For the plaintiff it was objected, that the legal estate in the mortgaged premises did not pass by the devise, which contemplated the passing of interests which the devisor had full right to limit and control as he pleased; and that as the holding at 378*l.* per annum had been created subsequently to the mortgage, the mortgagee could only distrain for the original rent, which alone was incident to the reversion assigned to him. The learned Judge was of opinion, that the estate in mortgage passed under the general words "all my messuages, lands, tenements and hereditaments," and that the devisee of the mortgage was entitled to adopt the new term of the demise to the plaintiff. A verdict having been found for the defendant,

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*Russell*, Serjt., in Easter term last, moved for a rule nisi, for a new trial, and in support of the first objection cited *Morgan* ex parte(b), and *Lord Braybroke v. Inskip* (c), there referred to by Lord *Eldon* in giving judgment. Upon the second point, he urged that the mortgagee could not sue upon the contract of the mortgagor subsequent to the execution of the mortgage. Even the notice given to the plaintiff by *Alsop* required the plaintiff to pay rent at the rate of 250*l.* per annum; and the only evidence to support the claim for rent at the rate of 378*l.* was that plaintiff had said that he

(a) *Et vide ante*, iii. 109, n.

(c) 8 Ves. 417.

(b) 10 Ves. 101.

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considered that 189*l.* was due from him for half a year's rent.

LORD TENTERDEN, C. J.—The plaintiff can have no rule upon the last point. The other would be better in a case.

BAYLEY, J.—In *Moss v. Gallimore (a)*, the mortgagor remaining in possession was considered as the agent of the mortgagee.

Rule nisi for a new trial on the first point, unless the defendant consented to a case.

No arrangement for a special case having been come to,

*Talfourd* (with whom was *Campbell*) now shewed cause against the rule for a new trial, and admitted that the cognizance could not be supported on the general devise of the testator's messuages, tenements and hereditaments, but contended that the words "securities for moneys," coupled with a trust to be executed by the heir, were sufficiently large to pass the legal estate in the land which formed the securities for the mortgage debt. This shews that the testator had no intention of excepting the estate in mortgage, and without such an intention manifested, it passes under the general words, *Lord Braybroke v. Inskip (b)*. *Crips v. Grysil (c)* is a direct authority. It is reported by Croke as follows: "Ejectione firmæ of lands in Leighton Bussard, of the demise of *Robert Key*. Upon a special verdict the case was: That *John Grysil*, father of the defendant, was seised in fee of the said lands; and upon the 10th day of October, anno 16 *Jacobi Regis (d)*, by indenture of feoffment mortgaged them to *Peter Key* and his heirs, upon condition that if he or his heirs paid to *Peter Key* and his heirs 150*l.* upon the 20th day of October, anno domini 1624, he might re-enter. That afterwards, upon the 30th day of

(a) Dougl. 279.

(c) Crn. Car. 37.

(b) 8 Ves. 417.

(d) A. D. 1618.

March, anno 1619, the said *Peter Key*, by his will in writing, gave to *Robert Key* all his goods, monies, bills or bonds, *mortgages or specialities for monies*, and made him his executor and died; and that the 150*l.* not being paid, *Robert Key* entered and let to the plaintiff; and without argument, the opinion of the Court was, that these words 'all my mortgages' made a good devise of the lands mortgaged; whereupon judgment was given for the plaintiff." For this purpose the estate in the land is the same thing as the money secured by it. *Silberschildt v. Schiott* (a). Here the devise is not as in *Wilkinson v. Merryland* (b), *Strong v. Teutt* (c), *Roe d. Reade v. Reade* (d), *Morgan, ex parte* (e), subjected to any charge which the party had no right to impose upon property in which he had not the entire beneficial interest. On the other hand, it cannot be supposed to have been the intention of the testator, when he was giving to his executors and trustees the fullest controul over his property, to exclude them from the means of enforcing the payment of the debt by distress upon the tenant during the continuance of the plaintiff's interest, or by an ejectment after it should be determined.

*Russell*, Serjt., and *E. V. Williams*, contrà. The right to distrain is claimed in respect of the inheritance; and in this the mortgagee had only a bare trust estate, which it cannot be supposed the testator meant to devise, and of the existence of which he was, in all probability, ignorant; otherwise he would not have used words sufficiently large to embrace this trust estate when making a provision for his family in the form of a strict settlement. It is said, that the estate passed under the words "securities for moneys." No authority is cited in support of this position, except the anomalous case of *Crips v. Grysil*. There, however, we find the word "mortgages," which may, perhaps, have been understood to mean the mortgage tenures. Here

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(a) 3 V. & B. 49.

(d) 8 T. R. 118.

(b) Cro. Car. 447, 449.

(e) 10 Ves. 101.

(c) 1 W. Bla. 201.

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the words are used in connexion with tools, utensils, ready money and personal estate, which plainly shews that the word "securities" is used in the popular sense of written documents. And even the word "mortgages" would not, when found in such company, be construed to extend to the estate in the land. *Tilley v. Simpson* (a). *Crips v. Grysil* is a singular case, and is irreconcilable with *Wilkinson v. Merryland* (b) which was decided a few years after *Martin*

(a) 2 T. R. 659, n.

(b) Cro. Car. 447, ibid. 449, W. Jones, 380, S. C. The principal difference between the two cases in Croke seems to be, that in *Crips v. Grysil* the mortgage had not become absolute at the time of the devise, whereas in *Wilkinson v. Merryland* the mortgage is stated to have been forfeited. In the latter case, the testator had the whole legal estate, subject to an equity of redemption in the mortgagor, which equity constituted the mortgagee a trustee for the mortgagor; but in *Crips v. Grysil* the testator had even at law merely a defeasible fee, the mortgagor having, at the time of the devise, still five years left in which to exercise his option of redeeming his land or not. This distinction seems to reconcile the two cases even without the aid of the concluding sentence of *Key's* will, which indeed in this view of the case would be immaterial, and may have been intentionally omitted by this most learned and excellent reporter, as forming no part of the ground of decision. In *Crips v. Grysil*, it may, perhaps, have been considered that if the word "mortgages" did not pass the land, and the mortgagor had refused to exercise the power of redeeming, the bequest might have been ren-

dered wholly nugatory, as the mortgagor might have elected to keep the money, and the land would have belonged to the heir of the mortgagee. And see Anon. P. 6 *Elis.* F. Moore, 58, 59.

In modern mortgages, or rather in the instruments commonly so denominated, (*ante*, iii. 108,) there is usually a covenant by the mortgagor to repay the sum advanced by the mortgagee, without giving the former an option between the land and the money.

In *Wilkinson v. Merryland*, the Court merely determined that no fee passed to the legatee of the mortgage who had entered and devised to the defendant in fee. The Court say (ibid. 450) "But the greater question would have been, whether an estate for life had passed to the wife, if she had been alive, because it is coupled only with personal things, as goods, leases, estates, mortgages, debts, &c., which may be intended that he meant only but estate for years, or mortgages for years; and so much the rather by reason of the words whereof I am possessed. And *Berkeley* (who was absent the day before) concurred in opinion, for the heir shall not be disinherited, nor the fee passed away without an apparent intent

v. *Mowlin* (a), and been cited for the sake of a mere extrajudicial dictum, which is supposed to have fallen from Lord *Mansfield*. *Silberschildt v. Schiott* (b) is also a mere dictum, contradicted by *Duke of Leeds v. Munday* (c), *Silvester*

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out of the words of the will. And in this case it doth not appear that he intended to pass but such things whereof he is possessed, which extend only to things personal, or leases whereof he is possessed, and not to freehold, whereof he is said in law to be seised; and peradventure, he was not possessed of this land, for it is not found that the mortgagee entered and was in possession. And commonly in mortgages, the mortgagor retains the possession until the mortgagee enters for a forfeiture; wherefore it was appointed, that judgment should be entered for the plaintiff. But they agreed if he had devised all estate in such land, or had mentioned that he had such land mortgaged in fee, and devised his mortgage, the fee had passed.

Sir W. Jones, who reports the case very shortly, says, "The question was, whether the wife had the mortgaged land devised to her, and if she had, whether she had the fee or not, and the opinion of the Court was, that at least she had but for life."

If, indeed, it had been found by the special verdict, as appearing upon the face of the indenture or otherwise, that the mortgage was intended as a mere security for money, the words "securities for money," or even the word "mortgage," in the bequest, might have been satisfied by giving the legatee the debt and the lien upon the

land in the seisin of the heir of the mortgagee.

(a) 2 Burr. 969. Of this case, Serjt. *Hill* says, "This is too clear a case to deserve a report." The language of Lord *Mansfield* is however very strong, "A mortgage is a charge upon the land, and whatever would give the money, will carry the estate in the land along with it to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the Statute of Frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow, notwithstanding the Statute of Frauds."

To this, Mr. Serjt. *Hill* has added the following note: "This is true in equity, but seems not to be so as to the legal estate, though the estate were freehold; and clearly so, if copyhold. See Cas. Temp. Hardw. 401; 7 Vin. 156; Cro. Car. 447, 449; 2 Atk. 102; 8 Vin. 207. pl. 14, 15; Eq. Abr. 178, ca. 19; ib. 211, ca. 20, 21; 2 Ld. Raym. 834; 2 Ch. Cas. 51; 1 Vern. 4; 3 Ch. Rep. 187; 2 Vern. 625; 2 Atk. 605."

(b) 3 V. & B 49.

(c) 3 Ves. 348.



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*v. Jarman* (a), and *Horsfall*, ex parte (b), which show, that by a bequest of the mortgage debt, the legal interest in the mortgaged land does not pass.

*Cur. adv. vult.*

BAYLEY, J., now delivered the judgment of the Court, and after stating the pleadings, proceeded thus:—Two clauses in the will were at different times relied upon as passing the house, &c. on which the distress was taken; the former containing terms sufficiently large to include the premises in question, but accompanied with words limiting the property which was the subject of that clause in strict settlement, and otherwise in a manner only applicable to estates over which the party has the absolute ownership. Upon this ground, we are of opinion that the property did not pass under that clause. In another part of the will is found a bequest of all the testator's stock in trade and utensils, ready money, and securities for money, debts, personal estate and effects; and it was insisted that under the words securities for money, this property would pass to the devisee. No words of inheritance are used with reference to this bequest, but the testator directed that the trustees or the heirs, executors, administrators or assigns of the survivor should dispose of his personal estate; and for some time the Court had a strong impression that from the use of the word "heirs," they might consider the mortgage in fee as passing under the words "securities for money," it being supposed that otherwise the word "heirs" would have had nothing to operate upon; but on looking further into the will, it will be seen that the property given to the trustees in the first clause in the will, was given to them their heirs and assigns; and that during the infancy of *Shore*, they were to appropriate the rents and profits to particular uses; and the word heirs in the second clause may apply to the control which the trustees, their heirs and

(a) 10 Price, 76.

(b) M'Clelland and Younge, 292.

assigns would have over the property during that period. We are, therefore, of opinion, that from this use of the word heirs, it cannot be inferred that the testator meant to pass his estate of inheritance in the mortgage property. Then the case stands upon the effect of the second devise generally; upon which it is the opinion of the Court that the words are insufficient to pass the testator's interest. The general rule is, that you must first have words sufficient to pass the mortgage property; secondly, that it must not be limited to uses inapplicable to such property. This rule excludes the first clause, and we think that the words used in the second clause are inapplicable. *Crips v. Grysil* was relied on for the defendant. The words in that case very much resemble those which occur here; but upon inspecting the record of the special verdict, it appears that the will contained words which go much further than those which the reporter has extracted. The report mentions a bequest of goods, chattels, mortgages and securities for money; but the words of the will as set out in the special verdict are: "In the name of God, Amen. —The rest of my goods not bequeathed, (the will containing no previous disposition of any thing whatever,) my money bills or bondes, *morgages or specialties for money*, I doe give unto *Robert Kay* my sonne, and I doe make him my full and sole executor, yea, and alsoe my heire of this freehould, whilst it please God by him or his heire male he keepe it in the surname of *Kaye*; and for want of heire male by my sonne *Robert Kaye*, after his death, that is, *Robert* my sonne, if *Robert Kaye* my grandson be liveinge and have heire male, and the other *Robert* dead and leave noe heire male, then this freehould to *Robert* my grandsonne and his heires." It does not appear by the special verdict, that the testator had any property to which the expression, "I do make him my heir of this freehold" could apply, except the lands mortgaged to him in fee. It is true that the testator afterwards limits that freehold to *Robert Kaye* in tail male, with remainder to another *Robert Kaye* also in tail

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male (a). The distinction between *Crips v. Grysil* and the case now before the Court is this, that in *Crips v. Grysil* there is not only a bequest of the testator's mortgages and specialties for money, but also an appointment of the legatee "as heir of this my freehold." For this reason we are of opinion, that the case referred to is not an authority to shew that the words "securities for money" are sufficient to pass the estate in lands in mortgage, where the limitation is to the legatee, his executors, administrators and assigns, and where on the face of the will there is nothing which denotes an intention that under these words a freehold interest should pass.

Rule absolute (b).

(a) It may, perhaps, be supposed, that although this fact is not stated in the special verdict, it was conceded at the bar that the testator had another estate of inheritance, and that by consent the argument and judgment rejected the final clause, as inapplicable to the real circumstances of the case.

(b) "It is a question altogether of intention, and to be gathered from the scope and design of the whole will. If the intention be not otherwise pretty clearly expressed, and it be not inconsistent with the nature of the other provisions in the will, the understanding is, that the trust estate will pass." Per *Kent*, Chancellor, after reviewing the principal English cases, 13 Johns. Rep. 557, *Jackson v. De Lancy*; S. C. 10 Johns. Rep. 365. The report of the case of *The Duke of Leeds v. Munday* is not correct in stating that the Master of the Rolls had no doubt upon the subject. His idea was, that the estate did not pass; but, in consequence of a doubt, he made his decree conditionally, declaring the infant a trustee and mortgagee within

the act, (7 Ann. c. 19,) and ordering her to convey, as far as any legal estate in the mortgaged premises descended to her. There was certainly a reason for this, as the infant was not a mere naked trustee, for she had an interest in the money secured by the mortgage. 5 Ves. jun. 341, n. See also *Ex parte Sergison*, 4 Ves. jun. 147. In the *Attorney-General v. Buller*, 5 Ves. jun. 339, Lord Rosslyn said, that the general understanding then certainly was, that under general words a trust estate would not pass; but he observed that the reverse would have been the most convenient rule, as it might be more easy to find a devisee than an heir. He afterwards said, upon being consulted by Lord Eldon, that he was rather overcome in that case by the observation of the Attorney-General, (Sir John Mitford,) and he inclined to the opinion of Lord Eldon, 8 Ves. jun. 437. *Ex parte Brettell*, 6 Ves. jun. 577, came on upon a petition, and "was not," says Lord Eldon, (8 Ves. jun. 437,) "so attentively considered as the importance of the point required."

If carefully considered, it will not be found to be in contradiction to the doctrine in *Jackson v. De Lancy*; the only question, as may be collected from the report, being as to the intention of the testator. "The rule as now settled is, that trust estates will pass by the usual general words in a will passing other estates, unless it can be collected from the expressions in the will, or the purposes and objects of the testator, that it was his intention they should not pass." Per *Kent*, 13 Johns. Rep. 555. This is also the rule laid down by Lord Eldon in *Lord Braybrooke v. Inskip*, 8 Ves. jun. 417, after much consideration, and he shewed it to be clearly settled. See also *Roe v. Reade*, 8 T. R. 118; and *Ex parte Morgan*, 10 Ves. jun. 101. The diversity of opinion upon the subject to be found in the modern Chancery cases is most satisfactorily accounted for by Chancellor *Kent*, (13 Johns. Rep. 559,) the old cases exhibiting an entire agreement. It may not be improper to observe, that it has been said, arguendo, by very eminent counsel, in the Su-

preme Court of Pennsylvania, that a general devise of all a testator's estate does not pass a trust; for which *The Attorney-General v. Buller* was cited, and the Court did not contradict it, *Jenks v. Backhouse*, 1 Binn. 93." Note by Mr. Ingraham, the American editor of Vesey junior, to *The Duke of Leeds v. Munday*, 3 Ves. 348.

And see Sir Thomas Littleton's case, 2 Ventr. 351; *Wynn v. Littleton*, 1 Vern. 3, and 2 Chan. Rep. 51; *Marlow v. Smith*, 2 P. Wms. 198; *Davis v. Gibbs*, 3 P. Wms. 26; *Chester v. Chester*, *ibid.* 55, 61, 62; *Casborne v. Scarfe*, 1 Atk. 605; *Bowes*, *ex parte*, *ibid.* 605, in notes; *Timewell v. Perkins*, 2 Atk. 102; *Pickering v. Bowles*, 1 Brown, C. C. 193; *Whiteacre*, *ex parte*, at the Rolls, 1807, 1 Sand. Uses and Trusts, 285; *Attorney General v. Vigor*, 8 Ves. 273; *King v. Denison*, 1 V. & B. 275; *Thompson v. Grant*, 4 Madd. 436; *Rentoize v. Cooper*, 6 Madd. 371; *Wall v. Bright*, 1 Jac. & Walk. 494; *Doe d. Bunny v. Rout*, 7 Taunt. 79.

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#### PLACE v. FAGG, Bart. and WILLIAM ASHBY.

**CASE** for injury to plaintiff's reversionary interest in certain fixtures. Plea, not guilty. At the trial before *Alexander*, C. B., at the spring assizes for the county of Kent, the jury found a verdict for the plaintiff for 1000*l.*, the damages laid in the declaration, to be reduced to 1*s.* on the defendants' withdrawing from the possession, subject to the opinion of the Court upon the following case:—

Sir John Fagg was sheriff of Kent in 1826. The other defendant was a millwright, and having obtained a judgment against *John Ashby*, 19 July, 1826, a *fi. fa.* issued to the

By a mortgage of a mill, the stones, tackling and implements necessary for the working of the mill pass to the mortgagee.

Under a *fi. fa.* the sheriff cannot take fixtures in a house, whereof the freehold is in the debtor.

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sheriff of Kent, commanding him to levy of the goods and chattels of *John Ashby* 600*l.* Under that writ the sheriff seized the stones, tackling and implements of a mill, situate, &c.; which mill had been built by the defendant, *William Ashby*, upon land belonging to him. On the 17th December, 1825, *W. Ashby*, in consideration of 900*l.* released unto *John Ashby*, his heirs and assigns, (in the actual possession, &c.) all that piece or parcel of land or ground situate, &c., containing by admeasurement one acre and nine perches, little more or less; and also all that wind or grist-mill, and the messuage or tenement, dwelling-house and premises on the said piece or parcel of land or ground, or on some part thereof, erected and built, together with all and singular out-houses, &c., rights, members and appurtenances whatsoever, habendum to *John Ashby*, his heirs and assigns. After the execution of this deed *William Ashby* delivered to *John Ashby* possession of the mill and the mill stones and the other articles belonging to the mill, which were afterwards seized by the defendant, Sir *John Fagg*. *William Ashby* took from *John Ashby* a warrant of attorney to confess judgment, as a security for part of the purchase money. On the said 17th December, 1825, for the purpose of securing the payment of an annuity of 20*l.* per annum, *John Ashby*, in consideration of 250*l.*, the purchase money of the annuity, by indenture, bargained, sold and demised to the plaintiff, all the before mentioned premises, by the same description as that by which they were conveyed by the defendant *William Ashby* to *John Ashby*, habendum to the plaintiff for the term of 1000 years, at a pepper corn rent. On the 31st December, 1825, in consideration of the further sum of 550*l.*, *John Ashby*, for the purpose of securing the payment of a further annuity to the plaintiff, by indenture declared that the said plaintiff, his executors, administrators, and assigns, should stand possessed of the premises, as well for the purpose of securing the payment of that annuity, as for securing the payment of the former annuity. No memorials of the indentures of the 17th of December, 1825, and the 31st of December, 1825, (whereby

the said annuities were granted to the said plaintiff), or either of them, were produced or proved to have been made or inrolled. The money secured by the warrant of attorney given by *John Ashby* to *William Ashby* not having been paid as agreed upon, the latter entered up judgment upon the warrant of attorney, and issued the *fi. fa.* under which the mill stones and other articles used with the mill were seized by the other defendant, Sir *John Fagg*. The plaintiff gave notice to the sheriff, that he claimed the articles seized under the *fi. fa.* as his property, by virtue of the deed of 17th December, 1825, whereby *John Ashby* conveyed to the plaintiff the mill and appurtenances. The sheriff, in consequence of that notice, did not sell, but retained the same in his possession. It was sworn and not contradicted at the trial, by the surveyor who estimated the value of the premises on the purchase of the first annuity by the plaintiff of *John Ashby*, that the defendant, *William Ashby*, went over the mill with him, and pointed out what belonged to it; and described the articles seized as forming part of the mill. And it was also sworn and not contradicted, that the same machinery was in the mill at the time of the execution of both the annuity deeds to the plaintiff, as was then at the time of the conveyance and valuation from the defendant, *William Ashby* to *John Ashby*, and of the levy under the execution. The stones seized are moveable articles, and such as are usually valued between an outgoing and in-coming tenant. This evidence was objected to by the plaintiff, but received.

The question for the opinion of the Court is, whether the mill stones and the other articles mentioned in the declaration, and being in the possession of *John Ashby*, were at the time of the seizure under the *fi. fa.* the property of the plaintiff. If the Court shall be of opinion that they were, then the verdict is to stand for the plaintiff, otherwise a nonsuit is to be entered.

*Joshua Evans*, for the plaintiff. The question for the con-

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sideration of the Court is, whether these articles did not pass by the conveyance. They were necessary for the working of the mill; they would, therefore, go to the heir, as mill stones would for the same reason. Com. Dig. *Biens*. *Day v. Bisbitch* (a) and *Archer v. Bennett* (b) were decided upon the same principle. In *Colegrave v. Dias Santos* (c) this Court held, that by a conveyance of the freehold, fixtures passed. In *Thresher v. East London Waterworks Company* (d) a covenant by the tenant to repair the demised premises was held to extend to fixtures. In *Sheppard's Touchstone*, 90, it is said, that by the grant of a mill, the mill-stones will pass, albeit at the time of the grant it be actually severed from the mill. [Parke, J.—No authority is there cited; but in *Liford's* case (e) it is said (f), “And it is resolved in 14 H. 8, 25 b (g), in *Wystowe's* case of *Gray's Inn*, that if a

(a) Cro. Eliz. 374.

(b) 1 Levinz, 131, & 1 Siderfin, 211. S. C.

(c) 2 B. & C. 76; 3 D. & R. 255.

(d) 2 B. & C. 608; 4 D. & R. 62.

(e) 11 Co. 46, b.

(f) Ibid. 50, b.

(g) M. 14, H. 8, fo. 25, pl. 6, where the case is thus reported. “Intrespas, brought by *Wystow*, of *Gray's Inn*, for the taking of a millstone. To which the defendant says, that the Abbot of *St. Alban's* is seised of the manor of *Redborne*, in the county, &c. (and) before the trespass, and at the time was seised of the said manor in fee, “ut in jure domûs,” and that the said *Wystow* held a house of the said abbot, as of the said manor, by certain service and suit to the mill of the said abbot within the said manor; and for not doing of suit, he distrained the said millstone. To which the plaintiff said, the said millstone was fixed to a great piece

of timber, “cum clavis et asseribus,” &c.; so that, (a sa pretence,) according to his own pretence, he could not take that as distress.

*Brudnell*.—Your plea is not good. Notwithstanding that it was fixed to a piece of timber, still he can take them as a distress. But if you will aid yourself upon your matter, you must shew that within the said house you had a horse-mill, which was annexed to the said house, and that the said millstone was parcel of the mill. Wherefore he did so. To which the defendant said, that the stone was severed from the mill; that is to say, the millstone was raised for the purpose of being picked, at the time of the distress. Wherefore, &c. And it was held, that notwithstanding that it was severed, it could not be distrained, for it remained parcel of the mill for all the time it lay upon the other stone. And notwithstanding this was raised up to be picked and *belt*, it is still parcel of the mill; as one cannot

man has a horsemill, and the miller take the millstone out of the mill to the intent to pick it, to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill as if it had been always lying upon the other stone; and by consequence, by the lease or conveyance of the mill it shall pass with it." In *Wynne v. Ingelby* (a) it was held, that the fixtures of a house could not be taken in execution. *The King v. Topping* (b) confirms the former decisions.

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*Hutchinson*, contra. The old rule is now much relaxed, and whatever may be removed by the tenant may be taken in execution. [*Bayley, J.* Does not *Elwes v. Mawe* (c) bring you back to the old authorities?] Any thing which the tenant might remove, or which might have been sold to an in-coming tenant may be taken under a *fi. fa.* Secondly, it does not appear that possession was delivered under the deed.

BAYLEY, J.—Fixtures which the tenant has a right to remove, may be treated as chattels in a proceeding against the tenant; but as against the owner of the estate, they are part of the freehold. No delivery of the fixtures under the mortgage was necessary; for the reason already stated, they passed with the land.

The other Judges concurred.

Postea to the plaintiff.

distrain windows or doors, notwithstanding that they hang upon hooks, and are removable. And *Fitzherbert* said, that notwithstanding they take a millstone into the house to be picked, and remove it from the hearth unto the floor, still the lord cannot distrain this, because it is a thing for the common weal; but if there were another millstone lying there, he may well enough distrain that, and

so of the windows, doors, &c." The reporter adds, "Query, of a smith's anvil, for it seems all one, if it be that which he uses in his trade, (*ceo sur que il occupie*,) notwithstanding it may be off the stock."

(a) 5 B. & A. 625; 1 D. & R. 247.

(b) *M'Clelland & Younge*, 551.

(c) 3 East, 38.



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BLADES *v.* FREE, Executor of CLARK.

The continued adoption by a person of contracts made by his wife, or by a woman whom he holds out to the world as his wife, for necessities ordered by her for the use of the family, is not evidence of a contract by him that his estate shall be liable for necessities ordered by her after his death, and supplied by the tradesman before he has notice of that event.

**ASSUMPSIT.** The eleventh count stated, that the testator, in his life-time, resided with one *Mary* as his wife, and divers his children and servants, and was about to depart this realm and go to the East Indies; and thereupon, in consideration that the plaintiff would, after such departure, supply to the order of the said *Mary* such goods, for the use of the said *Mary* and the said children and servants, as the said *Mary* should reasonably require, he the said defendant undertook &c., that he *Clark* would pay the plaintiff for the same. Averment, that plaintiff did supply the said *Mary* with certain goods, which she reasonably required, for the use of her the said *Mary* and the said children and servants, being then and there of great value, to wit, of the value of &c. Averment of non-payment by the said *Mary*, or by the testator or the defendant. The twelfth count varied from the eleventh by inserting, as a restriction of the promise, "until reasonable and lawful notice to discontinue such supply should be given to the plaintiff;" and averring that the goods were supplied before any reasonable or lawful notice had been given to the plaintiff to discontinue such supply. The thirteenth count stated the consideration to be the supply of goods until the return of the testator, or notice from him to discontinue the supply; or, in case of the death of the testator after his departure, without having returned them, until the plaintiff should reasonably have notice of the death of the testator. Averment, that *Clark* had not returned or given notice to discontinue the supply, and that the goods were furnished before the plaintiff had notice of the death of *Clark*. The declaration also contained counts for goods sold, &c. At the trial before Lord *Tenterden*, C.J., at the sittings at Westminster after Michaelmas term, 1827, a verdict was found for the plaintiff on the special counts, subject to the opinion of this Court upon the following case:—

*George Ward Clark*, the deceased testator, during the year 1822, and until January, 1823, resided upon his own freehold at Kensall Green, in the county of Middlesex, with *Mary Steers*, who dwelt with him as his wife, and passed by his name, but was not, in fact, married to him, and their children and servants. In January, 1823, *Clark* went to India, leaving *Mary Steers* and family on the premises at Kensall Green, who continued to deal with the plaintiff and other tradesmen, and resided there until the end of August, 1825. During the residence of *Clark* at Kensall Green, and up to the time of his departure from England, he dealt upon credit with the plaintiff and other tradesmen for articles supplied for the use of himself and his said family, the orders being given by *Mary Steers*, and the goods being paid for by *Clark* at certain periods after delivery. The plaintiff continued to supply goods in the way of his trade to the order of *Mary Steers*, for the use of herself and the said family, from January, 1823, until the end of August, 1825. The goods for which this action was brought were so supplied between October, 1824, and May, 1825. *Clark* died in India on the 31st of December, 1824, without having returned to this country. The defendant paid to the plaintiff, before the commencement of this action, the sum of 7*l.*, being the value of so much of the goods as were supplied up to and including the 31st of December, 1824. In August, 1825, intelligence of the death of *Clark* reached England, and was communicated to the plaintiff.

*F. Kelly*, for the plaintiff. The Court may come to the conclusion which the jury might have drawn from the facts stated, and the question here is, whether *Clark* did not contract to pay for goods which should be furnished before the arrival of a countermand. [*Bayley, J.* Suppose she had been his wife?] This is a stronger case than that of a wife, because it is more probable that a wife would be provided for. The real question is, what was the original

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contract. If a contract had been made in express terms, to the effect that the testator would pay until notice, that contract would not be rescinded by the act. [*Parke, J.* Suppose she had gone away, and cohabited with another man, would *Clark* have been liable for goods afterwards ordered by her? Should you not have stated the qualification? You are to express, in legal language, the terms of the implied contract. One restriction would be as long as she conducted herself as his wife. He only undertook to pay as long as she conducted herself properly.] That restriction would have been raised by law. [*Parke, J.* The plaintiff could not recover on the common counts by reason of the testator's death. If an express contract had been made in the terms of the thirteenth count, the testator would not have been discharged, even by adultery.] In support of the eleventh count it should be observed, that this is not merely an authority to trust *Mary Steers* as his wife. The liability does not arise wholly out of his representing her as his wife. If an authority would be determined by death, a contract would not be so determined (*a*). Death, without notice, does not avoid acts done by virtue even of a mere authority, *Macdonnell v. Macdonnell* (*b*). [*Parke, J.* If the rule contended for could be established, there would in every case be a contract to ratify the act of the agent until notice of the death.] If the plaintiff had sued her, she might have said that the supplies were not furnished on her credit. [*Bayley, J.* She would have falsely represented herself, and thereby rendered herself liable. If she

(*a*) Inter causas omittendi mandati etiam mors mandatoris est: nam mandatum solvitur morte: si tamen per ignorantiam impletum est, competere actionem utilitatis causâ dicitur. Julianus quoque scripsit, mandatoris morte solvi mandatum: sed obligationem aliquando durare. Dig. 17, 1, 26.

(*b*) Buck's Reports, 399. And

see the Digest, 17, 1, 58; Pothier, Traité du Contrat de Change, part. 1, chap. 6, art. 1, § 168; 40 Ass. fu. 249, pl. 38; 2 Roll. Abr. Feffment, (S.) 1; *Tute v. Hilbert*, 2 Ves. jun. 118; *Pye ex parte*, 18 Ves. 140, 2, 6; *Snaithe v. Mingay*, 1 M. & S. 95; *Wynne v. Thomas*, Willes, 565; *Cutts v. Perkins*, 12 Massach. Rep. 210.

had been the testator's wife, it would have been the same thing.]

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BAYLEY, J.—A man may undoubtedly make a contract which shall bind his estate after his death, for the price of goods supplied by the order of his wife or of his mistress, given after his death. Here the contract is not express but implied. The utmost which the law would imply in this case would be, that as the testator permitted this woman to appear as his wife, or the mother of his children and the mistress of his family, his executor was not at liberty to deny that she had authority to bind his estate to the same extent that a lawful wife might have done. A wife would have had authority to pledge her husband's credit under such circumstances during his life, but the authority would have been revoked by death. It has been urged that this would be a hardship upon the tradesman in the case of a wife, and still more so where the orders are given by a mistress. But a tradesman who gives credit does so at his peril, and must be presumed to know the legal consequences, and that if the husband is dead at the time he receives the order, he has no remedy for his debt. If, notwithstanding this, he chooses to trust, it must be taken that he is willing to run that risk. On the other hand, he may desire to have an express contract, or decline giving further credit without a written authority. The husband may give the wife a written authority to obtain goods at reasonable prices after his death. If the tradesman does not get such an authority, or see it in the hands of the wife, he acts at his own peril. He ought to take care to protect himself against such a contingency. *Mary Steers* possessed the ordinary authority of a wife, but nothing further; and on the death of *Clark* that authority wholly ceased.

LITLEDALE, J.—The only question between these parties is, what contract the law implies from the conduct of the testator, as it does not appear that the plaintiff had

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any personal communication either with the testator or with *Mary Steers*. This is not to be considered as one continuing contract; a separate contract arose between them upon the delivery of each article. The adoption by the testator of each successive contract merely authorised the tradesman to go on as before. The testator then goes abroad and dies, and there the authority ends. No action can, therefore, be maintained for the price of those goods which were supplied after the testator's death. The tradesman ought to receive ready money, unless he chooses to run the risk of its turning out that the party is dead at the time the goods are ordered.

PARKE, J.—Unless the plaintiff can make out a contract with the testator, it is clear that he cannot recover under the present action. This indeed was admitted in the course of the argument. I am of opinion that no contract whatever has been proved. The utmost that can be said is, that the testator authorised the plaintiff to treat with *Mary Steers* as if she had been the testator's wife. This would give her an implied power to bind him as a wife could have done, for necessaries only. The authority was given only during the life of the party. But the plaintiff can recover only upon such a contract as was stated in one of the counts of the declaration. Upon the implied authority given in this case, the testator would be liable only for necessaries; whereas the contract stated in the declaration contains no such restriction.

Postea to the defendant.



## SWEETING v. HALSE.

1849.

**ASSUMPSIT** by drawer against acceptor of a bill for 157*l.*, dated 26 March, 1826, payable two months after date. At the trial before Lord *Tenterden*, C. J., at the sittings at Westminster after last Easter term, the following facts appeared. The plaintiff being possessed of 157*l.* 4 per cents., sold out at the request of defendant, and lent him the proceeds, being 150*l.*; to secure which the bill declared upon was accepted by defendant, and purported to be drawn by one *Hammond*, now supposed to be a fictitious person. On the day before this bill became due, the plaintiff was prevailed upon to renew the bill for six months. The above acceptance was struck through, and the following was indorsed on the bill:—

“ £157.

London, May 28th, 1826.

Six months after date pay to me or my order the sum of one hundred and fifty pounds stock, new four per cents., for value received.

To Mr. *Halse*,*J. W. Sweeting.*

66, Great Titchfield Street,  
London.

Accepted,

*J. Halse.”*

The action was commenced in Hilary term, 1827, but the declaration contained no count upon this substituted contract. It was objected, on the part of the defendant, that the original contract having been rescinded, the plaintiff was bound to resort to the substituted contract. It was answered, on the part of the plaintiff, that assuming that the plaintiff had assented to the cancellation of the acceptance, which however did not appear, that assent must have proceeded upon the supposition that an available security had been substituted; whereas here it did not appear that the defendant had performed the condition upon which the supposed cancellation had proceeded, or that he was compellable to fulfil the second engagement, no evidence of that engagement being receivable for want of a stamp. The learned Judge directed the jury, that if

On the day before an acceptance becomes due, the name of the acceptor is erased, and a new contract between the acceptor and the drawer, who is also the holder, is indorsed on the bill, but is not stamped. The jury cannot look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent.

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they were of opinion that the acceptance had been cancelled with the assent of the plaintiff, and a new contract substituted, the plaintiff was bound to seek his remedy under the new agreement; and that in the present action their verdict ought to be for the defendant. Leave was, however, given to the plaintiff to move for a rule to enter a verdict for the amount of the bill, if the jury, under this direction, should return a verdict for the defendant. Such a verdict having been found, Sir *J. Scarlett*, in the following term, obtained a rule nisi to enter a verdict for the plaintiff, or for a new trial.

*Campbell* and *Barstow* now shewed cause. In *Reed v. Deere* (a) the plaintiff declared upon two written agreements, the first of which only was stamped. The second agreement, which was also declared upon, varied materially from the first; and the Court held, that though the second agreement could not be read to support the declaration, it might be looked at for the purpose of ascertaining whether the first was altered by it. The only difference between that case and the present is, that here the plaintiff has no count upon the second agreement, which, as far as it goes, makes the present case stronger against the plaintiff than *Reed v. Deere*. As the instrument here declared upon appeared on the face of it to be cancelled, it lay upon the plaintiff to explain that circumstance. If it should be urged that the objection amounts to accord without satisfaction, the answer is, that accord without satisfaction is a bad plea only where there has been a prior default; before default, a promise may be discharged by parol.

Sir *J. Scarlett* and *Chitty*, contra. The defendant seeks to relieve himself from one contract by setting up another, which he has equally broken. He cannot discharge himself from the first, by reason of the substituted contract, without shewing that he has performed it, or at least that

(a) 7 B. & C. 261.

he has given the plaintiff an available remedy, *Roe d. Earl Berkeley v. Archbishop of York* (a). Then the second instrument cannot operate, according to the intention of the parties, as a bill of exchange, because it is drawn not for money, but for stock, and it cannot be made available for any purpose for want of a stamp, *Wilson v. Vysar*, (b). A third objection to this second agreement is, that the first contract having been broken, could not be discharged by accord without satisfaction.

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LORD TENTERDEN, C.J.—In *Reed v. Deere* the Court looked at the second instrument for the purpose of satisfying themselves whether the first agreement was thereby varied. Here the jury were allowed to look at the unstamped agreement, and the jury, with a knowledge of the fact that the plaintiff was party to an instrument purporting to be a security for the same sum, were required to say whether the first security had been cancelled with the assent of the plaintiff. The jury were placed in a situation in which they might, and probably did, infer the fact of assent from the contents of an unstamped agreement. This could not be legally done.

BAYLEY, J. concurred.

LITTLEDALE, J. was absent.

PARKE, J.—There was some evidence of the assent of the plaintiff to the cancellation of the bill, independently of the unstamped agreement. As, however, the jury may have arrived at that conclusion, under the influence of their knowledge of the particulars of the second agreement, from an inspection of the unstamped indorsement, I am of opinion that there ought to be a new trial, though I should have been satisfied with the verdict which the jury have

(a) 6 East, 86.

(b) 4 Taunt. 288.



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given, if the unstamped agreement had not been laid before them (a).

Rule absolute.

(a) *Vide Doe d. Lord Trynham v. Roper*, 6 Bingh. 561.

CROSS v. JOHNSON and others.

Issue on justification; and a new assignment, on which judgment is suffered by default. Upon a verdict for the defendant on the issue, he is entitled to the whole costs of the trial, provided no other plea covering the trespasses newly assigned be found for the plaintiff.

Where the general issue is on the record, and the defendant means to suffer judgment by default on a new assignment, so much of the general issue as applies to the trespasses newly assigned should be withdrawn.

**DECLARATION** in trespass, stating that defendants broke and entered plaintiff's close, destroyed the gates, spoiled the herbage, broke down the trees and hedges, filled up a fishpond, and pulled down an outhouse. Plea; first, not guilty, generally. Secondly, a right of common for all cattle over the locus in quo, by the custom of the manor, in respect of a customary messuage. Thirdly, a right of way over the locus in quo. Replication, joining issue on the plea of not guilty; taking issue on the right of common and right of way; and new assigning that defendants committed the trespasses on other occasions and for other purposes than those in the pleas mentioned, and to a greater extent and with more force and violence than was necessary, and in other parts of the close out of the way in the third plea mentioned. Rejoinder, joining issue upon the denial of the right of common and right of way; the defendant at the same time withdrawing the plea of not guilty so far as related to the new assignment, and suffering judgment by default thereto. At the trial before *Alexander*, C. B., at the Cambridgeshire assizes, the jury found for the plaintiff upon the plea of not guilty, with one shilling damages; for the plaintiff also upon the issue on the right of common; for the defendants upon the issue on the right of way; and assessed the damages upon the new assignment at 5/. Upon taxation the master allowed the defendants the costs of the issues (b), and the plaintiff the costs of executing a writ of inquiry.

(b) Where the costs in the cause are adjudged to the defendant, and to the plaintiff costs on the issues found for him, the costs of the

issues, except in replevin, include only the costs of the pleadings. *Othir v. Calvert*, 1 Bingh. 275. *S. C.* 8 J. B. Moore, 239.

*B. Andrews*, in the course of last term, obtained a rule nisi for the master to review his taxation, and to allow the plaintiff his full costs of the cause, less the costs of the issue found for the defendant.

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*F. Kelly*, who now appeared to shew cause, was stopped by the Court, who desired to hear

*B. Andrews* in support of his rule. The plaintiff is entitled to his costs, because he could not have recovered damages without going to trial. It is true the defendants had withdrawn their plea of not guilty, so far as related to the trespasses newly assigned, and had suffered judgment by default upon the new assignment; but still the plaintiff could not, upon these pleadings, have recovered upon a writ of inquiry the damages to which it is clear he was entitled. If the plaintiff had proved before the sheriff, as the verdict shews he did at the trial, that the defendants had committed trespasses more in number, or with greater violence, than was necessary for the assertion of their right of way, still the sheriff's jury could not have awarded him the 5*l.* damages which he obtained at the trial, because the answer to such evidence would have been, that such trespasses were justified by the plea of the right of common(*a*), which plea had not been disposed of. Such being the case,

(*a*) The new assignment is an assertion that the trespasses therein mentioned, though apparently covered by the plea, were not really so, 1 Wms. Saund. 300, *a.*, and that, therefore, the *quæ est eadem* is false, and the *nil dicit* to the new assignment admits this to be the case. This admission, however, does not affect the answer given to the whole declaration by a plea of not guilty. *Vickers v. Gollimore*, 2 M. & P. 359; 5 Bingh. 196; *post*, 294, *n.* Where, therefore, the defendant pleads nothing to the new assignment, but

suffers the plea of the general issue to stand to the whole declaration, the proper entry seems to be "And as to the trespasses above newly assigned, the defendant says nothing *further* in bar or preclusion of the said action of the said plaintiff, in respect of the said trespasses so above newly assigned." Or thus, "And the said defendant as to the trespasses above newly assigned, says *as before* that he is not guilty thereof, *modo et formâ*;" without any judgment or award of *venire tam quam*.

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*Longden v. Bourn* (a) is a direct authority to shew that the plaintiff here is entitled to his costs. That was an action of trespass for cutting down trees. The pleas were, first, not guilty; and secondly, a justification that the trees obstructed a highway. The replication joined issue on the plea of not guilty, took issue on the plea of highway, and new assigned cutting down trees extra viam. The defendant joined issue on the replication to the special plea, and suffered judgment by default on the new assignment. The jury having found a verdict for the defendant on the issue on the special plea, and assessed damages on the new assignment, it was held, that the plaintiff was entitled to full costs, except upon the issue on the special plea, and that the defendant was not entitled to costs even on that issue. That decision is expressly in point. He also cited *House v. The Treasurer of the Thames Navigation* (b).

LITLEDALE, J. (c).—I entertain no doubt upon this case. The defendants pleaded not guilty to the whole declaration, and also several pleas of justification, the issue upon one of which was found for them. The plaintiff new assigned that the defendants committed the trespasses for other and different purposes, and with more force and violence than was necessary. The defendants then withdrew their plea of not guilty so far, and suffered judgment by default as to the new assignment. Now the defendants having pleaded a justification to the whole declaration, and

(a) 1 B. & C. 278. *Longden v. Bourn* is very briefly reported, and none of the authorities seem to have been there brought under the consideration of the Court.

(b) 6 J. B. Moore, 324; 3 Brod. & Bingh. 117. The ground of the decision there was, that the plaintiff was bound to go to trial, in order to get rid of the plea of not guilty. But in *Griffiths v. Davics*, 8 T. R. 466, where there was to

one count in trespass, and several pleas in justification, on which issues were taken; new assignment, as to which judgment by default; all the issues found for the defendant:—Held, that the defendant was entitled to the costs of those issues. See also *Postan v. Stanway*, 5 East, 261; 1 Smith, 499; *Thornton v. Williamson*, post, 293, (a).

(c) *Bayley, J.* was absent.

having had the issue joined upon that justification found for them, would of course have been entitled to the costs of the action, except for the new assignment. But the defendants suffered judgment by default as to the new assignment, therefore the plaintiff was not obliged to go to trial upon the new assignment, and might have recovered before the sheriff's jury all that he recovered at the trial. It is said that damages were given at the trial upon the new assignment which could not have been given by the sheriff's jury, and the apparent difficulty in the case arises upon that argument. But I think the case may be considered in the same light as if the plaintiff had first set out in his declaration all the alleged trespasses, and had then averred that the defendants, pretending to exercise rights of way and common, committed other trespasses not necessary for those purposes. Suppose the defendants had pleaded not guilty to the trespasses mentioned in the first part of the count, and had also justified these trespasses, and had suffered judgment by default as to the residue, and the plaintiff had obtained a verdict on the plea of not guilty, and the defendants had obtained a verdict on the plea of justification, the verdict on the plea of not guilty would have been immaterial, because the plea of justification would have covered all the trespasses in the first part of the count. I do not mean to say that I ever saw a declaration so framed, but it appears to me that upon a declaration so framed, the plaintiff in this case might have recovered on a writ of inquiry all the damages which he recovered at the trial, and therefore that he would not have been entitled to the costs of a trial. *Thornton v. Williamson* (a) is a very similar case to the present.

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(a) 13 East, 191. Trespass, for entering a messuage and yard, &c. Pleas, first, not guilty, as to the force and arms; secondly, a justification by a right of way *at all times*; and thirdly, a like justification *in the day time*. Replication, taking issue on the two rights of way, and new assigning extra viam, &c., to which there was judgment by default. Verdict for the plaintiff on the first special issue, damages one shilling; and for the defendant on the *vi et armis*, and on the second special issue: and nominal damages assessed on

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PARKE, J.—It would have been competent to a sheriff's jury to have entertained the whole question between these parties. In order to determine whether the plaintiff or the defendant is entitled to the costs of the trial, it is necessary to look at the *postea*. Now the *postea* in this case shews that all the issues, that is, all which this jury were impanelled to try, were found in favour of the defendants. A verdict on any one issue going to the whole cause of action, entitles a party to the whole costs. Here the defendants had a verdict on one issue which went to the whole cause of action. They are therefore entitled to judgment on the whole record, and they are therefore also entitled to the costs of the trial. This rule, consequently, must be discharged. *Thornton v. Williamson* is an authority in support of this decision.

Rule discharged (*a*).

the new assignment:—Held, that the defendant was entitled to the general costs of the trial, because the plaintiff was not obliged to go to trial, but should have let judgment go by default on the issue upon the limited right of way, which was found against him. In *Harber v. Rand*, 9 Price, 336, where to trespass *quare clausum fregit* the defendant pleaded a public highway over the locus in quo, and the plaintiff new assigned *extra viam*, on which the defendant suffered judgment by default, and a verdict was found for the defendant upon the issue, and damages were assessed for the plaintiff on the new assignment, the Court held that the plaintiff was not entitled to more costs than damages. But where defendant pleaded not guilty to the whole declaration, and justified as to part of the trespasses, and plaintiff newly assigned, to which

defendant suffered judgment by default, plaintiff being bound to go down to trial to get rid of the general issue, which would otherwise bar his whole action, was entitled to his full costs of the trial, although the jury found a verdict for the defendant upon the special pleas, which covered part of the trespasses, the costs of such issues being deducted, but not allowed to defendants. *Booth v. Ibbotson*, 1 Y. & J. 354.

(*a*) Upon a record framed as above, the defendant would at *nisi prius* be entitled to begin, and, if the plaintiff called evidence, to have the general reply. In *Rees v. Rogers and others*, which was trespass for entering the plaintiff's yard, the defendants, without a plea of not guilty, justified under various rights of way. The plaintiff new assigned, and the defendants suffered judgment by default on the

new assignment. Upon the trial before Lord *Tenterden*, C. J., at Guildhall, 23d December, 1830, the defendants' claim to begin was resisted, on the ground that the plaintiff had to prove his damages. His lordship ruled that this circumstance made no material dif-

ference, and directed that the defendants should begin. The plaintiff having called evidence, the defendants' counsel replied, and obtained a verdict. Counsel for the plaintiff, *Campbell*, *F. Pollock*, and *Cockburn*; for the defendants, *Sir J. Scarlett* and *Manning*.

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### HARDY v. RYLE, Esq.

**FALSE imprisonment.** Plea, not guilty. At the trial before *Jervis*, J. at the Chester summer assizes (a), for 1828, the following facts appeared. The plaintiff was committed by the defendant, a magistrate for the county of Chester, to the house of correction, under the supposed authority of 4 Geo. 4, c. 34, s. 3(b), for one month, under the following

(a) Counsel for the plaintiff, *J. Williams* and *Wightman*; for the defendant, *Cross*, Serjt. and *J. Jervis*.

(b) Which enacts "That if any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person shall contract with any person or persons whomsoever to serve him, her or them, for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract, (such contract being in writing, and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil

the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace of the county or place where such servant in husbandry, artificer, &c. or other person shall have so contracted or be employed or be found, and such justice is hereby authorised and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them with whom such servant in husbandry, artificer, &c. or other person shall have so contracted, or by his, her or their steward, mannger or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, &c. or other person, and to examine into the nature of the complaint, and if

A contract to weave certain goods at the house of the weaver is not a contract to serve within 4 Geo. 4, c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver "for neglecting his work after commencing upon the same."

An action for false imprisonment against a magistrate may be commenced on the 14th of June, where the plaintiff is discharged out of custody on the 14th of December.

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warrant: "Whereas information and complaint hath been made before me, *John Ryle*, Esq. one of his Majesty's Justices &c., by *Thomas Hall*, of &c., silk manufacturer, upon the oath of the said *T. Hall*, against *Henry Hardy*, of &c., silk weaver, that he the said *H. Hardy* did contract and agree with the said *T. Hall* to weave certain pieces of silk goods at certain prices fixed upon between the said *T. Hall* and *H. Hardy*, at his the said *H. Hardy's* house in &c., and that he the said *H. Hardy* had neglected to fulfil the contract so entered into between them, although he had commenced upon the said work under the said contract." The following is a copy of the warrant of commitment:

"And whereas, in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and upon due consideration had thereof, have adjudged and determined that the said *H. Hardy* hath in his said service been guilty of certain misconduct and ill-behaviour towards the said *T. Hall*, in that he the said *H. Hardy*, having contracted with the said *T. Hall* to weave certain pieces of silk goods at certain prices fixed upon between the said *T. Hall* and *H. Hardy*, at his the said *H. Hardy's* house, in &c., hath neglected to fulfil the contract so entered into between them, although he hath commenced upon the said work under such contract, and

it shall appear to such justice that any such servant in husbandry, artificer, &c. or other person shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a proportionable part

of his or her wages for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof to punish the offender by abating the whole or any part of his or her wages, or to discharge such servant in husbandry, artificer &c., or other person from his or her contract, service or employment, which discharge shall be given under the hand and seal of such justice gratis."

hath neglected his work without the leave or consent of the said *T. Hall*, and I do therefore convict him the said *H. Hardy* of the said offence in pursuance of the statute in that case made and provided." The warrant then went on to command the constable to convey the plaintiff to the house of correction at Knutsford, and the keeper to receive him, there to remain for the space of one month from the date of the warrant.

The plaintiff was discharged out of custody on the 14th December, 1827, at nine o'clock in the morning (*a*), and the writ issued on the 14th of June, 1828. The defendant put in the conviction recited in the warrant of commitment. Upon these facts it was contended, that the plaintiff ought to be nonsuited, first, because the action was not commenced within six calendar months after the act done, as required by 24 Geo. 2, c. 44, s. 8; and secondly, that the conviction and commitment were warranted by 4 Geo. 4, c. 34, s. 3. The jury assessed the plaintiff's damages, in case he was entitled to recover, at one farthing; and the learned Judge nonsuited the plaintiff, with leave to move to enter a verdict for the damages found by the jury. A rule nisi to that effect having been obtained,

*Cross*, Serjt., and *J. Jervis*, now showed cause. The 24 Geo. 2, c. 44, provides, (s. 8,) "that no action shall be brought against any justice of the peace for anything done in the execution of his office, unless commenced within six calendar months after the act committed." Under this statute the time within which the action is to be brought must be reckoned exclusively of the day on which the imprisonment took place. *Rex v. Adderley* (*b*), where all the cases are collected; *Pellew v. The Hundred of Wonford* (*c*), *Norris v. Hundred of Gawtry* (*d*), *Castle v. Burditt* (*e*),

(*a*) *Vide post*, 301, n.

(*b*) Dougl. 463.

(*c*) *Ante*, 130.

(*d*) Hob. 195.

(*e*) 3 T. R. 623, *post*, 301, n.



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*Clarke v. Davey* (a), Com. Dig. Temps, A., *Pugh v. Duke of Leeds* (b), *Thomas v. Popham* (c), recognized and adopted in *Watson v. Pears* (d), *Fallon, ex parte* (e), *Lester v. Garland* (f), where the question was, whether the plaintiff was privy to the act; *Glassington v. Rawlings* (g), adopted by the Master of the Rolls in *Lester v. Garland*, *Wallace v. King* (h), and *Basten v. Carew* (i); and though the contrary was decided in *Lester v. Garland*, and *Pellew v. The Hundred of Wonford*, those were cases in which, according to the distinction taken by Sir W. Grant, M.R., the party was not privy to the act; whereas here the plaintiff must be privy to the imprisonment; no mischief could arise. [Bayley, J. According to the construction contended for, the plaintiff would have six months in a case of imprisonment, and one day more upon seizure of goods.]

The Court directed that the second point should not be spoken to unless their decision upon the first point should render it necessary.

*J. Williams* and *Wightman*, in support of the rule upon the first point. The common sense and invincible reasoning of the Master of the Rolls are decisive upon this point, *Pickersgill v. Palmer* (k). The preamble to the annuity act is equally strong.

*Cur. adv. vult.*

The judgment of the Court upon the first point was delivered on a subsequent day (l) by

BAYLEY, J. who, after stating the facts, and referring to the language of 24 Geo. 2, c. 44, s. 8 (m), proceeded thus: The

(a) 4 J. B. Moore, 465.

(b) Cowp. 714.

(c) Dyer, 218, b.; F. Moore, 40.

(d) 2 Campb. 294.

(e) 3 T. R. 283.

(f) 15 Vesey, 248.

(g) 3 East, 407, and 4 Esp. 224.

(h) 1 H. Black. 13

(i) 5 D. & R. 558, 3 B. & C. 649.

(k) Bull. N. P. 24.

(l) 25 April.

(m) *Ante*, 297.

same construction must prevail, whether the act complained of be an imprisonment or a seizure of goods. All the authorities were considered by Sir William Grant, M. R. in *Lester v. Garland*, upon which this distinction was taken, that where the act is one to which the party against whom the computation is made, the day on which the act is done may be included. Where that party is a stranger to the act, the day ought to be excluded, and many instances are put. Here every continuance of the imprisonment is, in point of law, a new imprisonment. The same construction must be put upon 24 Geo. 2, c. 44, s. 8, whether the act complained of be imprisonment or seizure of goods. In the case of seizure of goods of the plaintiff's, that being an act to which he is not privy, the day of the seizure would be excluded from the computation. In *Pellew v. The Inhabitants of the Hundred of Wonford* (a), this Court acted upon the rule laid down by Sir William Grant, M. R. holding that the day of the happening of the event was to be excluded from the computation. So where the party who is to give the notice is the party robbed, he must be taken to know when he was robbed. Upon this principle, my brother *Littledale* and myself are of opinion, that the 14th December ought to be excluded, and that the action was commenced in time. My brother *Parke*, having been counsel in the cause, has taken no part in this discussion.

*J. Jervis* now shewed cause upon the second point. The words "handicraftsman or other person" will include silk weavers. The warrant of commitment sets out a complaint that the plaintiff had contracted to do certain work, that he had commenced the work under the contract, and that he had neglected to fulfil such contract, and the magistrate adjudges that he has been guilty of misconduct in his said service towards his master, in that he having contracted &c., hath neglected to fulfil the contract, although he hath commenced upon the said work under such contract, and hath neglected his work without the leave or

(a) *Ante*, 130.

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consent of his master. A commitment is not to be construed with the same strictness as a conviction. *The King v. Helps* (a).

*J. Williams* and *Wightman*, *contra*. Silk weavers are regulated by 17 *Geo.* 4, c. 56; and it cannot be supposed that the legislature meant to give jurisdiction over them by a subsequent statute, in which they are not named. But however this may be, it is clear that 4 *Geo.* 4, c. 34, s. 3, applies only to contracts of *service*. Here no such contract appears. A servant may be guilty of larceny in respect of goods with which he is entrusted; here the plaintiff could not have committed a larceny in respect of the silk delivered to him.

BAYLEY, J.—It becomes unnecessary to decide whether the silk trade is within the provisions of 4 *Geo.* 4, c. 34, s. 8. To bring a case within that act, the party must have contracted to *serve*. There is a plain distinction between becoming the servant of another, and contracting to do specific work for him. A person who has contracted to do work for many persons cannot with propriety be said to have contracted to *serve* each of them. The conviction and commitment are bad in not showing that the plaintiff contracted to *serve*.

LITLEDALE, J.—I am of the same opinion. The 4 *Geo.* 4, c. 34, s. 3, requires either actual service, or a contract for service. Here neither is to be found. The defendant, therefore, does not shew that he had jurisdiction.

PARKE, J. gave no opinion.

Rule absolute (b).

(a) 3 M. & S. 331.

Notice of action against justices served 15 May; latitat issued 15 June. Qu. whether issued too soon.

(b) In an action against magistrates, the notice was served on the 15 May, the latitat issued 15 June. In supporting a rule for setting aside a nonsuit before *Graham*, B. which had been obtained by

*Pell*, Serjt. on other grounds, *Maning* submitted that as the 24 *Geo.* 2, c. 44, requires the delivery of a notice in writing *at least* one calendar month before the suing out and serving of any process, the interval was not sufficient, and re-

ferred to *Zouch v. Empsey*, 4 B. & A. 522, as shewing decisively that the words "at least" made both days exclusive, although in that case it was urged, that in favorem libertatis such a construction ought not to be adopted. *Manning* was asked by the Lord Chief Justice if he was aware of the case of *Castle v. Burditt*, 3 T.R. 628. This he distinguished from that now before the Court, on the ground that the words "at least" did not occur in the Excise Act, 23 Geo. 3, c. 70; upon the construction of which the case of *Castle v. Burditt* had been decided.

*Adam* and *Bayly*, for the plaintiff, insisted, that the words "at least" made no difference; and they observed that it did not appear upon the evidence in the cause but that the service of the notice might have taken place at an earlier hour in the day than that at which the process issued.

The Court said, that the point was of importance to all the magistrates in the kingdom, and ought not to be disposed of in this summary way, where the parties had no opportunity of having the judgment of the Court revised upon a

writ of error, and directed that the cause should go down again to trial in order that the facts, *including the time of the day when the notice was served, and when the writ issued*, might be put upon the record. *Gould v. Hole and Whyte*, K.B., H.T. 1822, MSS.

At the Exeter summer assizes, 1822, the plaintiff abandoned his suit, and a verdict was recorded for the defendants. And see *Higgins v. M<sup>r</sup> Adam*, 3 Younge & Jervis, 1, and 16, (b).

A notice of action against a magistrate will support an action against the magistrate and constable jointly, *Jones v. Simpson*, 1 Crompton and Jervis, 174. So, though the plaintiff first sue out process against the magistrate alone, which he abandons. *Ibid*. So, where notice of action is served on each defendant, under 24 Geo. 2, c. 44, (*Bar v. Jones*, 5 Price, 168,) or in respect of proceedings under the Regent's Canal Act, (*Agar v. Morgan*, 2 Price, 126,) it is not necessary to state whether the action is intended to be joint or several, or to make any mention of the party or parties intended to be joined.

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END OF HILARY TERM.

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## MEMORANDUM.

In the course of this term *Edward Goulburn*, Esquire, was called to the degree of the coif, and gave rings with the motto, "Nulla retrorsum."

**CASES**  
ARGUED AND DETERMINED  
IN THE  
**COURT OF KING'S BENCH,**  
IN  
**EASTER TERM,**  
IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

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DOE, on the demise of AMBLER, v. WOODBRIDGE.

A new breach of a covenant not to *use* rooms in a particular manner, is committed every day the rooms are so used.

Upon a clause of re-entry on breach of covenant, ejectment may be supported in respect of a continuing breach of covenant, though rent has been accepted with knowledge of the original breach.

**EJECTMENT** for a dwelling-house situate in the city of London. Plea, not guilty, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after last term, the case was this. The house in question belonged to the lessor of the plaintiff, and was occupied by the defendant under a lease, which contained a covenant that the tenant should not alter, convert, or *use* the rooms thereof then used as bed-rooms, or either of them, into or for any other use or purpose than bed or sitting-rooms for the occupation of himself, his executors, &c., or his or their family, without the licence of the lessor in writing; and the lease also contained a clause of re-entry for breach of any covenant. The defendant had underlet some of the rooms specified in this covenant to a lodger, who occupied them down to the time of the trial; but the lessor, who lived next door, had, after he knew of that occupation, received rent of the defendant under the

lease. It was admitted that there had been a breach of the covenant, but it was contended that it had been waived by the subsequent receipt of rent, and therefore that the lessor was precluded from maintaining ejectment for the forfeiture. The Lord Chief Justice was of opinion that there was a continuing breach so long as the rooms were occupied contrary to the covenant, and therefore that the action was maintainable; and he directed the jury to find a verdict for the plaintiff, but gave the defendant liberty to move to enter a nonsuit.


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*Denman* now moved accordingly. The receipt of rent by the lessor, after knowledge of the breach of covenant by the lessee, operated as a waiver of the forfeiture. *Doe v. Allen* (a) in principle supports this argument. It was, indeed, there held, that if a lessee exercises a trade on the demised premises, by which his lease is forfeited, his landlord does not, by merely lying by and witnessing the act, though for several successive years, waive the forfeiture; but that some positive act of waiver, *as receipt of rent*, is necessary. But there the defendant was unable to prove any payment of rent after the commencement of the prohibited trade; and it seems to have been admitted by the Court that such proof would have been a good answer to an ejectment for the forfeiture. In *Doe v. Bliss* (b), and *Doe v. Bancks* (c), the breach of covenant was not complete at the time when the act relied upon as a waiver of the forfeiture took place; therefore those cases do not apply to the present: for here there was a complete breach of covenant by the first misappropriation of the bed-rooms, and a receipt of rent after knowledge of the fact. The original forfeiture, therefore, was clearly waived, and before the lessor could proceed for the continued breach of covenant, as for a new forfeiture, he ought at least to have given the lessee notice of his intention so to do.

(a) 3 Taunt. 78.

(b) 4 Taunt. 735.

(c) 4 B. & A. 401.

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Lord TENTERDEN, C. J.—The conversion of a private dwelling-house into a place of business, in violation of a covenant in a lease, is at once a complete breach of that covenant, and a subsequent acceptance of rent after notice of such conversion, is a waiver of the forfeiture thereby incurred. But the language of the covenant in this case is peculiar; it is, that certain rooms shall not be *used* (among other expressions) for any other than a specified purpose. That covenant has, it is admitted, been broken, and the breach of it continued. Rent was received subsequently to the first breach; but the breach was continued after the receipt of rent, and the demise was laid after the receipt of rent, and while the breach was continuing. I am therefore of opinion that there was a clear breach of covenant subsisting on the day of the demise, and that the prior receipt of rent was no waiver of the forfeiture thereby incurred. In this view of the case I think there is no ground for disturbing the verdict.

BAYLEY, J., and LITTLEDALE, J., concurred.

PARKE, J.—I am entirely of the same opinion. There was not only a continuing breach of covenant in this case, but something more; there was a new breach of covenant every day that the rooms were used by the under-tenant; and the landlord was at liberty to take advantage of any one of them.

Rule refused (*a*).

(*a*) In *Dumport's* case, 4 Co. Rep. 119, it was held, that where a lease contains a general proviso against alienation without licence, the lessor, by licensing one alienation or assignment, puts an end to the proviso altogether. It, therefore, seems prudent to insert in the covenant and proviso, the words "for and in respect of every such

alienation, assignment, underlease, &c." Under the common proviso, however, a mere waiver of the right to re-enter for the first alienation, as by the acceptance, with knowledge of the alienation, of rent accruing subsequently thereto, does not destroy the right to re-enter for a subsequent alienation. *Doe d. Boscawen v. Bliss*, 4 Taunt. 735.

## PAGE v. NEWMAN.

1829.

**ASSUMPSIT** on the following instrument:—"Guerêt, 18th April, 1814. In one month after my arrival in England, I promise to pay Captain *Page*, or order, the sum of 135*l.* sterling, for value received. *C. Newman.*" The declaration contained two counts, the first describing the instrument as an agreement, and the second as a promissory note. The pleas were, first, the general issue, non assumpsit, and secondly, the statute of limitations. Upon the first plea issue was joined. To the second plea there was a replication that the plaintiff had commenced this suit in 1819 by latitat, and continued it by bill of Middlesex. To this replication the defendant demurred, and after argument the plaintiff obtained judgment on the demurrer (*a*). At the trial before Lord *Tenterden*, C. J. at the adjourned Middlesex sittings after last term, the case was this:—In the spring of 1814, the plaintiff and defendant being both prisoners of war at Verdun in France, the plaintiff made advances of money to the defendant, as a security for the repayment of which, the defendant executed the instrument in question. The defendant returned to England in the month of June, 1814; and after several ineffectual attempts to obtain payment of the money secured by the instrument during the year 1818, the plaintiff in the year 1819 commenced the present action. The only question at the trial was whether the plaintiff was or was not entitled to recover interest upon the sum secured by the instrument, and from what period, whether from the expiration of one month after the defendant's return to England, or from the time when the plaintiff first endeavoured to obtain payment of the principal. The Lord Chief Justice was of opinion, that as there was no evidence of any express agreement for the payment of interest, the plaintiff was not entitled by law to recover interest at all; and the jury, under his lord-

A security for money lent, whereby the borrower promises to pay the creditor 135*l.* in one month after his arrival in England, carries no interest.

(*a*) *Vide ante*, vol. ii. 528; 8 B. & C. 489.



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ship's direction, found a verdict for the plaintiff for 135*l.* the amount of the principal only.

*Denman*, now moved for a rule nisi in the alternative, either to increase the damages by the amount of the interest upon 135*l.*, calculated either from the year 1814, when the defendant returned to England, or at least from the year 1818, when the plaintiff endeavoured to obtain payment of his debt, or for a new trial. First, the Court will increase the damages by the amount of the interest. In *Blaney v. Hendricks* (a) the Court of Common Pleas decided that interest is due on all liquidated sums from the moment the principal becomes due and payable; and that on all bills of exchange, notes of hand payable at a day certain, accounts stated, or money lent, the jury in assessing the damages may give interest. In *Hilhouse v. Davis* (b), which was an action of debt to recover a sum awarded to the plaintiff by a jury under certain acts of parliament, as compensation by a dock company for an injury done to the plaintiff's property, this Court held that the jury might give interest for the detention of the sum awarded. In *Arnott v. Redfern* (c), where the subject was fully discussed and all the cases bearing upon it considered, the Court of Common Pleas decided that where after a creditor has endeavoured to obtain payment, there has been a wrongful withholding of a debt arising out of a contract, which does not carry interest, the jury may allow interest in the shape of damages, for the unjust detention of the debt. And *Best*, C. J., in delivering the judgment of the Court, said, "If a debt, however contracted, has been wrongfully withheld after the creditor has endeavoured to obtain payment of it from the debtor, the jury may give interest in the shape of damages, for the unjust detention of such debt:" and afterwards added, "although interest may not be due *ex contractu*, yet a party may be liable to pay it by way of damages in

(a) 3 Wils. 205; 2 W. Bla. 761.

(b) 1 M. &amp; S. 169.

(c) 3 Bingh. 353; and see *Edowes v. Hopkins*, post, 310.

the case of an unreasonable delay in the payment of the sum due under the original contract." The present case comes within the principles laid down in both the cases last cited. There has been unreasonable delay in paying the debt, and an unjust detention of the debt in this case; therefore, interest was recoverable in the shape of damages. Secondly, at all events the Court will grant a new trial. It was a question for the jury whether there had been unreasonable delay in paying the debt, or an unjust detention of the debt; and that question not having been left to the jury, there ought to be a new trial.

Lord TENTERDEN, C. J.—I am of opinion that we ought not to grant any rule in this case. The instrument declared upon did not express upon the face of it that it was to carry interest, and there was no evidence that any agreement had been entered into for payment of interest. This is, therefore, simply a case of money lent, and it is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest. In *Calton v. Bragg (a)*, Lord *Ellenborough*, adverting to this subject, and alluding to a period exceeding fifty years, said, "During

(a) 15 East, 223, where it was held that interest is not allowable by law upon money lent generally, without a contract for it expressed, or to be implied from the usage of trade, or from special circumstances, or from written securities for the payment of principal money at a given time. So, also, in *Shaw v. Picton*, 7 D. & R. 201; 4. B. & C. 715, it was held, that interest is not payable on money lent, unless by the usage of trade, or from the course of dealing between the parties, a bargain to pay interest can be inferred. So, in *Du Belvoir v. Lord Waterpark*, 1 D. & R. 16, it was held, that interest upon

a promissory note is to be considered as damages for the detention of the principal, and forms no part of the original debt; and, therefore, that where a promissory note was made abroad, and the payee did not sue upon it till thirty years afterwards, and the jury refused to give interest, the Court could not, after verdict, increase the damages by adding the interest. But in *Laing v. Stone*, ante, ii. 561, it was held, that a bill or note payable on a day certain, carries interest from that day, unless the non-payment has been occasioned by the negligence of the holder.

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this long course of time no case has occurred, where upon a mere simple contract of lending without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances from whence a contract for interest was to be inferred, has interest ever been given." In *Higgins v. Sargent (a)*, decided so lately as 1823, it was held that interest was not recoverable in covenant upon a policy of insurance on the life of A., payable six months after due proof of the death of A., although the money insured was not paid at the time stipulated. In that case, as in the present, the principal was payable upon a contingency, but it was held, that interest could not be recovered from the time when the principal became due. I think it would be attended with mischievous consequences, if we were to open the practice that has prevailed so long. If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in the report of *Arnott v. Redfern* would seem to warrant, namely, that interest is recoverable in every case where the principal has been wrongfully detained after the creditor has endeavoured to obtain payment of it, it would necessarily become a question at the trial whether the detention was wrongful, and whether proper endeavours had been made to obtain payment; and the opening such a question to the jury would, in my opinion, be productive of much inconvenience and some danger. I think it safer and more convenient to adhere to the long established rule, that interest is not payable upon money secured by a written instrument, unless it appears upon the face of the instrument that it was intended that interest should be paid, or unless such an intention may be implied from the usage of trade, as in the case of mercantile instruments. The present case does not fall within either of those exceptions, and, indeed, the language of the instrument is such as rather tends to the conclusion that the parties intended that interest should not be payable.

(a) 3 D. & R. 613; 2 B. & C. 348.

The sum secured is 135*l.* only; it is payable upon a contingency, namely, in a month after the defendant's arrival in England; and there is no provision for the payment of interest up to that period. If there had been such a provision, that would have gone far to support the argument that the parties also intended that interest should be paid from the time when the principal became due, to the time of actual payment; but the omission of any such provision in the instrument is, to my mind, conclusive to shew that the sum of 135*l.* was the only sum intended to be paid under any circumstances. In proceedings in error in the Court of Exchequer Chamber, interest is never allowed, except in cases where interest would have been recoverable in the Court below.

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BAYLEY, J. and LITLEDALE, J. concurred.

PARKE, J.—I am entirely of the same opinion. I would only add with reference to the last observation made by my Lord Chief Justice, that in *Arnott v. Redfern* the action was brought upon a judgment of a foreign Court, which Court had allowed interest. The decision of the Court of Common Pleas, therefore, was little more than a confirmation of the judgment of the foreign Court on that particular point (a), and does not appear to me to affect the general question raised in this case.

Rule refused (b).

(a) So upon affirmance or non-pros in error, interest is given where the cause of action, upon which the judgment is recovered, bore interest. See the cases collected, Tidd, 9th ed. 982.

(b) So in *Foster v. Weston*, 6 Bingh. 711, it was held, that no interest should be allowed upon an instrument in the following form: "I hereby bind myself to A. for the due payment of 1500*l.*; which amount is to be handed over

and delivered to A. in goods for sale on account of B: Now the condition of this obligation is such, that the sum of 1500*l.* is to be duly paid and remitted to A. in three equal payments of 500*l.*, at three, five, and seven months from this date."

In all actions of debt, however, the plaintiff had and has at common law a right to require the jury who try the issue, to assess the damages which he has sustained by the de-

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tention of the debt, and to execute a writ of inquiry for that purpose after judgment, where no issue has been tried; but in neither case could interest, *eo nomine*, be assessed for the plaintiff; first, because the law would imply no contract to pay interest, as such contract would have been illegal if expressed; and secondly, that in the absence of a contract, express or implied, the jury could only find nominal damages, unless evidence were laid before them of actual damage.

In *Gibson v. Ferrers*, Winch, Rep. 114, 120, it appeared upon the pleadings in an action on a bond, that an award had been made that *interest* should be paid to the plaintiff for money, &c. Defendant demurred, on the ground that the award was void, because it was for payment of interest, and usury is a thing unlawful. But it was answered, "that it shall not be taken for usury, but rather for damages for forbearance of the money. But admitting it was for interest, in the proper signification of the word, yet it is good; for by the statutes, &c. contracts for interest money are not void, so as they did not exceed so much as is limited by those laws. And the opinion of the Court was, that the award was good, for an arbitrament shall not be taken absolutely upon the bare words. And the Court commanded the parties to come before them on the morrow in the treasury; and, as it seems, this was for mediation to make an agreement, for the opinion seemed to be for the plaintiff."

Interest has been held to be recoverable where money is awarded to be paid on a certain day, and a demand is made on that day.

*Pinhorn v. Tuckington*, 3 Campb. 468, by Lord *Ellenborough*. So where the demand is made after the day, interest has been held to be recoverable from the time of the demand, by *Abbott, J.*, in *The Marquess of Anglesea v. Chafey*, *Dorchester spring assizes*, 1818. MSS. But interest is not recoverable on the old security called a single bond, *Hogan v. Page*, 1 B. & P. 337; or upon the arrears of an annuity, *Tew v. Earl of Winterton*, 1 Ves. jun. 451; *Creuze v. Hunter*, 2 Ves. jun. 167; *Anderson v. Dwyer*, 1 Scho. & Lefr. 301; upon which no interest is due unless the annuitant has been prevented from exercising his legal remedies by injunction, in which case he is entitled to interest, *O'Donnell v. Browne*, 1 Ball & B. 262, to be computed from the filing of the bill, *Morgan v. Morgan*, 2 Dick. 643, or at least from the granting of the injunction. And see *Pulteney v. Warren*, 6 Ves. 73, where, in an account of meane profits since the title accrued, interest was decreed against executors, upon the ground that the plaintiff had been prevented from recovering in ejectment by a rule of the court of law, and by an injunction at the instance of the occupier, who ultimately failed both at law and in equity.

In *Eddowes v. Hopkins*, Dougl. 376. Lord *Mansfield* held, that although by the common law book debts do not, as of course, carry interest, it may be payable in consequence of the usage of particular branches of trade; or of a special agreement; or, in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it.

## MAYNE v. FLETCHER.

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CASE for a libel on the plaintiff, alleged to have been published by the defendant in a newspaper called *The Chester Chronicle*. Plea, not guilty, and issue thereon. At the trial before the Chief Justice of Chester, at the last Lent assizes, the question turned upon the proof of publication, under the following circumstances. The evidence was confined to the production of a certified copy of the affidavit filed at the Stamp Office, pursuant to the statute 38 *Geo.* 3, c. 78, s. 1, in which the defendant was described as the printer and publisher of the newspaper in question, and of a newspaper containing the libel, the title of which, and the description of the printer and publisher, corresponded with those of the newspaper mentioned in the affidavit. It was objected on the part of the defendant that this was not sufficient evidence of publication, and that the plaintiff ought either to have produced the copy of the newspaper filed at the Stamp Office, or to have proved that the copy produced was published by the defendant. The learned Judge overruled the objection, and the plaintiff obtained a verdict, with leave for the defendant to move to enter a nonsuit.

Production of the affidavit filed at the Stamp Office, and of a newspaper corresponding with that therein mentioned, is sufficient proof of publication, in an action or indictment against the proprietor for a libel.

*Jones*, Serjt., now moved accordingly. The declaration necessarily alleged that the defendant published the libel in a newspaper called *The Chester Chronicle*; but there was no proof whatever to support that allegation. The affidavit filed at the Stamp Office did not at all prove the publication of the libel by the defendant; it proved, merely, that the defendant was the printer and publisher of a newspaper called *The Chester Chronicle*. The production of a newspaper so called, containing the libel, carried the evidence no further; in order to make out that the defendant published the libel, the plaintiff was bound to produce either a newspaper purchased of the defendant, or the copy filed at the Stamp Office, pursuant to the statute 38 *Geo.* 3, c. 78, s. 17. For all that appeared in this case, the paper con-

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taining the libel might have been surreptitiously obtained from the defendant's printing office, or might have been delivered from thence by mistake, which would clearly be no publication. *Rex v. Paine (a)*. The statute 38 Geo 3, c. 78, is entitled, "An act for preventing the mischiefs arising from the printing and publishing newspapers and papers of a like nature, by persons not known, and for regulating the printing and publication of such papers in other respects;" its principal object, therefore, was to secure to the public, in every case, a known and responsible publisher: but it clearly was not intended to relieve the plaintiff from all proof of publication by the defendant. The eleventh section of the statute provides that it shall not be necessary for the plaintiff to prove that the newspaper to which the trial relates was purchased at any house, shop, or office belonging to or occupied by the defendant, or his servant or workman, or where he usually carries on the business of printing or publishing such paper, or where the same is usually sold. But though that mode of proof of publication is dispensed with, another is substituted by the seventeenth section, which requires that every printer or publisher of a newspaper shall deliver to the commissioners of stamps one of the papers so published, signed by the printer or publisher, in his handwriting, with his name and place of abode; that the same shall be carefully kept by the commissioners; and that in case any person shall make application to the commissioners that such papers may be produced in evidence, the commissioners shall cause the same to be produced in Court. The intention, therefore, of the legislature was, that *the* newspaper signed by the publisher, and delivered to the commissioners should be produced in evidence as proof of publication, without which the provisions of that section become wholly nugatory; and the practice which

(a) 5 Mod. 167. "If a man deliver by mistake a paper out of his study, it is not a publication, though it be a libel." *Ibid.* And see *Algernon Sidney's* case 3 St. Tr. 807, 4 St. Tr. 197. But he would probably be held to be liable *civilly* to the parties who suffered by his carelessness.

has obtained since the passing of the statute in all proceedings against proprietors of newspapers, of producing that identical newspaper in evidence, shews that the profession and the public generally have put this construction upon the seventeenth section. *Rex v. Hart (a)*.

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Lord TENTERDEN, C. J.—I see no ground for granting the present application. The eleventh and seventeenth sections of the statute are perfectly distinct from each other. The seventeenth section supplies the public with means of producing a copy of the newspaper, which they did not previously possess, and of which a party may not possess the means of producing any other copy; but it does not make that particular copy the only evidence of publication. The eleventh section provides that it shall not be necessary, after such affidavit, &c., shall have been produced in evidence against the person who signed and made such affidavit, or is therein named, and after a newspaper shall have been produced in evidence, entitled in the same manner as the newspaper mentioned in such affidavit, and wherein the names of the printer and publisher, and the place of printing, shall be the same as those mentioned in such affidavit, for the plaintiff or prosecutor to prove that the newspaper to which the trial relates was purchased at any house, shop, or office belonging to or occupied by the

(a) 10 East, 94. But it was held in that case, that the affidavit required by the statute, together with the production of a newspaper corresponding in every respect with the description of it in the affidavit, was not only evidence of the publication of such paper by the parties named, but was also evidence of its publication in the county where the printing of it was described to be. It seems impossible, therefore, to consider that case as an authority for saying that the production of the newspaper delivered at the

Stamp Office is necessary; on the contrary, it seems to be a decision the other way, and conclusive against the argument urged in the principal case. It has, however, been held that the newspaper delivered at the Stamp Office is conclusive evidence of publication to sustain an indictment; *Rex v. Amphitt*, 6 D. & R. 125; 4 B. & C. 35; and *Holroyd*, J. there observed, that "the very object of delivering a copy at the Stamp Office is, that it may be evidence against the proprietor."



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defendant, or where he usually carries on the business of printing or publishing such paper, or where the same is usually sold. Independently of the statute, a newspaper purchased at the house, shop, or office of the defendant, would be evidence of publication; but by the express words of the statute the plaintiff or prosecutor is exempted from the necessity of bringing such evidence, upon the production of the affidavit filed at the stamp office, and of a newspaper corresponding in certain particulars with that mentioned in the affidavit. In the present case the plaintiff proved all that was necessary to bring him within the terms of that exemption, and therefore the proof of publication was sufficient.

BAYLEY, J.—By the eleventh section, the production of a newspaper corresponding with the newspaper described in the affidavit, places the plaintiff in the same situation as if he had produced a newspaper purchased at the house, shop, or office of the defendant. Such evidence of publication is only *primâ facie*, and is liable to be rebutted by proof of fraud; but if not rebutted, it is clearly sufficient.

LITTLEDALE, J. concurred.

PARKE, J., was gone to chambers.

Rule refused.

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The KING, on the Information of EDMUND LECHMERE  
 CHARLTON, Esq. v. JOHN SALWAY.

Where a charter of incorporation directs that certain officers shall be elected out

**INFORMATION**, stating that the town and borough of Ludlow, in the county of Salop, is an ancient town and borough, and that the burgesses of the said town and borough now are, and for divers, to wit, 20 years now last

of the burgesses and inhabitants, an usage to elect non-inhabitant burgesses is void.

Nor is such usage rendered valid by a charter of restoration, granting "all elections and rights of election previously enjoyed by virtue or pretence (*virtute vel pretestu*) of any charter, or by any other lawful manner, right or title."

past and upwards, have been and were one body corporate and politic in deed, fact, and name, by the name of the bailiffs, burgesses, and commonalty of the town and borough of Ludlow, to wit, at &c.; and that within the said town and borough, during all the time aforesaid, there have been or ought to have been, and still of right ought to be divers, to wit, 12 aldermen or principal burgesses of the said town and borough, and divers, to wit, 25 common-councilmen, of &c., and that the office of a common-councilman, of &c., during all the time aforesaid, hath been and still is a public office, and a place and office of great trust and pre-eminence within the said town and borough, touching the rule and government of &c., and the administration of public justice within the same town and borough, to wit, at &c., and that *John Salway*, late of &c., 28 October, 1825, at &c., did use and exercise, and from thence continually hath there used and exercised, and still doth there use and exercise, without any legal warrant, royal grant, or right whatsoever, the office of a common-councilman of &c., and during all the time last above-mentioned hath there claimed and still doth there claim, without any legal warrant &c., to be a common-councilman of &c., and to have, use, and enjoy all the liberties, privileges, and franchises to the office of a common-councilman, of &c., belonging and appertaining; which office, liberties, &c., the said *John Salway*, during all the time last above-mentioned, upon our said lord the king, without any legal warrant &c., hath usurped and still doth usurp, to wit, at &c., in contempt &c.

To this information the defendant pleaded three pleas.  
1st. That true it is that said town and borough is an ancient town and borough, and that the burgesses of &c. now are, and for the space of 200 years now last past and upwards have been, and at the time of the granting of the letters-patent hereinafter mentioned, were one body corporate, and by the name &c., to wit, at &c.; and that the office of a common-councilman, of &c., during all the time aforesaid, hath been and still is a public office &c., to wit, at &c., as

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by the said information is above suggested: And defendant further saith, that the lady *Elizabeth*, late Queen of England, by her letters-patent under her great seal of England, bearing date on a certain day in that behalf therein mentioned, to wit, the 23d day of October, in the 38th year of her reign, after reciting as therein mentioned, of her especial grace and of her certain knowledge and mere motion, for her, her heirs and successors, did thereby grant and ordain, that from thenceforth there might and should be within the town or borough of Ludlow aforesaid, from time to time, 37 of the more discreet and honest burgesses and inhabitants of the same town or borough who should be and be nominated the common-council of &c. aforesaid; of which same 37 burgesses and inhabitants, 12 of the most honest and discreet should be nominated and reputed aldermen or principal burgesses and inhabitants, one should yearly be elected to be chief bailiff of &c.; and of which 37, 25 being the residue of the same number, together with the aforesaid 12, should together be and be called the common-council of the town or borough aforesaid; of which same 25 one should yearly be elected to be second bailiff of the town and borough aforesaid; and after thereby assigning, nominating, constituting, and making certain persons therein named and specified to be the first and modern 12 aldermen or principal councillors of &c., and certain other persons therein also named &c. to be the first and modern 25 of the common-council of &c.; (which same 25, together with the aforesaid 12 aldermen, her said majesty thereby declared should be and be called the common-council of &c.;) and after declaring her will to be that the same 12 aldermen should be the principals and more worthy of the same council, the said queen willed, and by the said letters-patent for her, her heirs &c., granted, that whenever it should happen that the aforesaid 12 aldermen so as aforesaid nominated, or any of them, or the aforesaid 25 common-councilmen so as aforesaid nominated, or any of them, should die, or from their offices aforesaid, for ill govern-

ment in that behalf, be removed, that then and so often it should and might be lawful for the residue of the said 12 and 25, being the common-council of &c., or the major part of them, to elect, nominate, and prefer one or more other or others of the said number of the 25 burgesses and inhabitants of &c. for the time being, in the place or places of any person or persons of the said number of 12, and also one or more other or others of the burgesses and inhabitants of &c., in the place or places of any person or persons of the number of the aforesaid 25 so happening to die or to be removed, and him or them so elected and preferred again, for reasonable causes, from their place or offices aforesaid to remove, and that he or they so elected and preferred, or to be elected and preferred, into the number of the aforesaid 12, or into the number of the aforesaid 25, should be of the number of the same 12 and 25, in the like manner and form as the aforesaid other persons by her said majesty in those presents before constituted, were and should be; and so often as the case should so happen that by the death or removal of any of the same 12 aldermen, or by the death or removal of any of the same 25, the place of any of the same 12, or of any of the same 25, should be void, another or others of the *burgesses and inhabitants* of &c., in the place of the same 12 or 25 so happening to die or be removed, should be elected and preferred by the residue of the number of 12 or 25, or by the major part of them, into the number of the aforesaid 12 aldermen and of the aforesaid 25; and that the aforesaid aldermen and the aforesaid 25 so from time to time elected and preferred, and to be elected and preferred, should take a corporal oath before the bailiff of &c., for the time being, well and faithfully to execute the same offices (*prout patet per recordum*): which letters-patent afterwards, to wit, 1 November, 1596, the then burgesses of &c. accepted, to wit, at &c., and by virtue of the premises, the burgesses of &c. have from thenceforth hitherto been and still are one body politic &c., by the name &c., to wit, at &c.: That before and

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That the said John Salway, being a common-councilman of the City of London, did, in the said office, liberties, &c. in the said information mentioned, usurp, in manner and form as in and by the said

information is alleged against him: All and singular which matters and things said *John Salway* is ready to verify and prove, as the Court here shall award: Wherefore he prays judgment, and that the said office, franchise, &c. so by him claimed in form aforesaid, may be allowed and adjudged to him, and that he may be dismissed and discharged by the Court here of and from the premises above charged upon him.

The second plea states the borough to be by prescription, and states a prescriptive right to elect, upon any vacancy, one other of the burgesses of &c. to become and be one of such 25 common-councilmen of &c., and that the said vacant office of one of the said 25 common-councilmen to enter into and fill, to wit, at &c.; and such burgess so elected and chosen as aforesaid, for and during all the time aforesaid, hath been and still of right ought to be sworn and admitted into the said office of common-councilman before the bailiffs of &c.; and every burgess being so elected, sworn, and admitted, hath always, from time whereof &c., there had, used, and exercised, and of right ought to have had, used, and exercised, and still of right ought to have, use, and exercise the office of a common-councilman of &c., and had always, during all the time aforesaid, had, used, and enjoyed, and of right ought to have had, used, and enjoyed, and still of right ought to have, use, and enjoy there all the liberties, &c. to the said office of a common-councilman of &c. belonging and appertaining, to wit, at &c. This plea then alleges, as in the first plea, the election and admittance of *Salway*.

The third plea, after confessing the allegations in the information as in the first plea, states, that whilst the burgesses of &c. were such body corporate and politic as aforesaid, to wit, 19th December, 4 *W. & M.*, their said late majesties, by letters-patent under their great seal of England, bearing date &c., after reciting that a certain instrument in writing, bearing date 19th January, 36 *Cha.* 2, was made by the bailiffs, burgesses, and commonalty of

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their town or borough of Ludlow, in the county of Salop, or in the name of the bailiffs, burgesses, and commonalty of &c., and sealed with the common seal of them; in which certain instrument it was contained or mentioned that the aforesaid bailiffs, burgesses, and commonalty, granted and surrendered to their said majesties' aforesaid uncle (a), his heirs and successors, all and singular the powers, privileges, and authorities whatsoever wherewith they, or any select number of them, exercised or used, by virtue of any charter, letters-patent, customs, or prescriptions, of or concerning the election, nomination, constituting, or appointing of any person or persons to the several and respective offices of bailiffs, aldermen, justices of the peace, common-councilmen, recorder, town clerk, steward of the court-leet and view of frankpledge held within the town and borough aforesaid, coroner, serjeants at mace, and attorneys in the court of pleas held within the town and borough aforesaid, and every of their offices or places aforesaid, into or for the exercising or executing of them, or any of them, as by the aforesaid instrument inrolled in their said late majesties' Court of Chancery, and there remaining of record, did more fully appear: and after reciting also, amongst other things, certain letters-patent therein mentioned to have been granted by his late majesty King *James* the Second, their said late majesties King *William* the Third and Queen *Mary*, of their especial grace, and from the certain knowledge and mere motion of their said late majesties, gave, granted, restored, and released, and by these presents, for them, their heirs and successors, did give, grant, restore, and release to their well-beloved subjects, burgesses and inhabitants of the town or borough of Ludlow aforesaid, all and singular the liberties, privileges, powers and immunities, franchises, authorities, rights, jurisdictions, exemptions, and other profits and advantages whatsoever, so as aforesaid granted and surrendered, or mentioned to be granted or surrendered to their said late majesties' late uncle (a), in as ample manner and form as the aforesaid bailiffs,

(a) *Charles* II. uncle to both.

burgesses, and commonalty, or their predecessors, had or enjoyed, or ought to have had or enjoyed the premises, or any of them, before the day of the date of the thereinbefore recited instrument of surrender, and as if the said instrument of surrender had never been: And further, their said late majesties King *William* the Third and Queen *Mary* willed, and by those letters-patent, for them, their heirs and successors, did grant, restore, confirm, and ratify to the said bailiffs, burgesses, and commonalty of the said town or borough aforesaid, and their successors, (amongst other things,) also so many, so great, such, the same, such sort and the like liberties, franchises, powers, immunities, exemptions, privileges, authorities, quittances, rights, jurisdictions, wastes, void grounds, commodities, profits, emoluments, and hereditaments whatsoever, as the late bailiffs, burgesses, and commonalty of the town or borough aforesaid, or their predecessors, by whatsoever name or names, or by whatsoever incorporation, or pretence of whatsoever incorporation, before the day of the date of the aforesaid deed of surrender had held, used, enjoyed or occupied, or ought to have held, used or enjoyed, by themselves or their successors, by reason or pretence (a) of any charters, grants, or letters-patent, by any of their said late majesties' progenitors or ancestors, late kings or queens of England, in any manner, before the day of the date of the instrument or surrender aforesaid, made, granted, or confirmed, or by any lawful manner, right, or title, although the same, or any or either of them, had been forfeited, lost, or surrendered, and although the same, or any or either of them, had been misused, or not acted upon, abated, or discontinued: To have, hold, and enjoy to the aforesaid bailiffs, burgesses, and commonalty of &c., and their successors, for ever, (prout patet per recordum.) Which letters-patent the then burgesses of &c. afterwards, to wit, on &c. accepted, to wit, at &c. And by virtue of the premises the burgesses of the same borough have from thenceforth hitherto been, and

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(a) *Vide post*, 333, (a).



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still are, one body politic &c., by the name &c., to wit, at &c.: That the said instrument or deed of surrender in the same letters-patent mentioned, was a certain instrument or deed of surrender bearing date 19 January, 36 *Car. 2*, and that for a long time, to wit, for the space of 70 years, before, and at the time of the date and making of the said deed or instrument of surrender, the said bailiffs, burgesses, and commonalty of &c. aforesaid, by reason or pretence of a certain charter before then granted to them, to wit, the said charter or letters-patent in the said first plea mentioned, had, used, and enjoyed, and then did use and enjoy a certain power, franchise, election, and nomination, to wit, as follows; that is to say, that whensoever the place or office of one of the said 25 common-councilmen became and was vacant, the said 12 aldermen of &c., and the residue of the said 25 common-councilmen thereof, or the major part of the said aldermen and of the said common-councilmen of &c. for the time being, had, during the time last aforesaid, elected, nominated, and appointed, and at the time of the date of the said instrument of surrender, were used to and did elect, nominate, and appoint, and thence hitherto continually have elected, nominated and appointed, and used and enjoyed the right, franchise, and privilege of electing, nominating, and appointing some one or other of the burgesses of &c. to become and be one of such 25 common-councilmen of the said town and borough, and the said vacant office of one of the said 25 common-councilmen thereof to enter into and fill; and such burgess so elected, nominated, and appointed as aforesaid, for a long time before, and at the time of the date and making of the said instrument of surrender, had been, and was and of right ought to have been, and thence hitherto hath been and still is sworn and admitted into the said office of common-councilman, before the bailiffs of &c. for the time being; and every burgess so elected, appointed, nominated, sworn, and admitted as aforesaid, before and at the time of the making of the said instrument of surrender had been, and

was used and accustomed to have and exercise, and thence hitherto hath been used and accustomed to have and exercise the office and place of a common-councilman of &c., and all the liberties, franchises and privileges thereunto belonging and appertaining, to wit, at &c.; that before and on the 28th day of October, 1824, the office of one of the 25 common-councilmen became and was vacant, to wit, at &c., and that thereupon the said office, being so vacant as aforesaid, the major part of the said 12 aldermen of &c. for the time being, and of the 25 common-councilmen thereof, being then and there lawfully assembled together, did then and there together, to wit, on &c., at &c., elect, nominate, and appoint the said *John Salway*, then and there being one of the said burgesses of the said town or borough, to become and be one of such 25 common-councilmen of &c., and the said vacant office or place of one of the said 25 common-councilmen of &c. to enter into and fill, to wit, at &c.: And the said *John Salway* further saith, that being so elected, nominated, and appointed as aforesaid, he the said *John Salway* was afterwards, to wit, on &c., at &c., duly sworn before one Edward Welling and one E. Prodgers, (then and there being the bailiffs of &c.,) and did then and there before such bailiffs, in due form of law, take his corporal oath upon the Holy Evangelists of God, for the due and faithful execution of his duty as such common-councilman as aforesaid, and into the said office of a common-councilman of &c. was then and there, by the bailiffs aforesaid, duly admitted, and then and there duly entered into and upon the same; and by virtue of his having been so elected, nominated, appointed, sworn and admitted as aforesaid, he the said *John Salway* then and there became, and was and ever since hath been and still is a common-councilman of &c., to wit, at &c., and by that warrant he the said *John Salway*, for and during all the time laid and mentioned in the said information, did use and exercise, and hath thence hitherto used and exercised, and still doth there use and exercise the office of a common-

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councilman of &c., and for and during all that time hath claimed and still doth claim to be a common-councilman of &c., and to have and use and enjoy all the liberties, privileges, and franchises to the said office belonging and appertaining, as it was and is lawful for him to do for the cause aforesaid. *Absque hoc* that he the said *John Salway* the said offices, privileges, franchises, and liberties, in the said information mentioned, or any of them, upon our lord the king hath usurped, or ever did usurp, as in and by the said information is alleged against him. All which, &c.

To the first of these pleas there was a demurrer.

To the second the prosecutor replied, that before the time of the election of the said *John Salway*, in that plea mentioned, the said charter or letters-patent of the said *Lady Elizabeth*, late Queen of England, in the said first plea mentioned, had been accepted, as in the first plea is mentioned, and at the time of the said supposed election in that plea mentioned was in full force, virtue, and effect; and that by virtue thereof, long before and at that time, whenever the office of one of the said common-councilmen of &c. hath become and been vacant, the said 12 aldermen of &c., and the residue of the said 25 common-councilmen thereof, or the major part of the said common-councilmen for the time being, lawfully assembled, have elected and chosen, and of right ought to have elected and chosen, and still as and when there shall be any vacancy in the said number of 25 common-councilmen, of right ought to elect and choose some one other of the burgesses and inhabitants of &c. to become and be one of such 25 common-councilmen of &c., and the said vacant office of one of the said 25 common-councilmen to enter into and fill; and that such burgess and inhabitant so elected and chosen as aforesaid, of right ought to be sworn and admitted into the said office of common-councilman; and that every burgess and inhabitant being so elected, sworn, and admitted into the said office of a common-councilman of &c., as aforesaid, hath long before, and at the time of the said supposed

election in the said second plea mentioned, used and exercised, and of right ought to have used and exercised, and still of right ought to have, use, and exercise the office of a common-councilman of &c., and hath always, for and during all the time last aforesaid, had, used, and enjoyed, and of right ought to have had, used, and enjoyed, and still of right ought to have, use, and enjoy there all the liberties, franchises, and privileges to the said office of a common-councilman of &c. belonging and appertaining. *Absque hoc*, that from time whereof &c., whenever the office of one of the said common-councilmen of &c. hath become and been vacant, the said 12 aldermen of &c., and the residue of the said 25 common-councilmen thereof, or the major part of the said aldermen and of the said common-councilmen for the time being, being lawfully assembled, have been elected and chosen, and of right ought to have elected and chosen, and still as and when there shall be any vacancy in the said number of 25 common-councilmen, of right ought to elect and choose some one other of the burgesses of &c. to become and be one of such 25 common-councilmen of the said town and borough, and the said vacant office of one of the said common-councilmen to enter into and fill; and that such burgess, so elected and chosen as aforesaid, for and during all the time aforesaid, hath been and still of right ought to be sworn and admitted into the said office of common-councilman; and that every burgess, being so elected, sworn, and admitted into the said office of a common-councilman of the said town and borough as aforesaid, hath always, from time whereof &c. there had, used, and exercised, and of right ought to have had, used, and exercised, and still of right ought to have, use, and exercise the office of a common-councilman of &c. and hath always, for and during all the time in that plea mentioned, had, used, and enjoyed, and of right ought to have had, used, and enjoyed, and still of right ought to have, use, and enjoy there all the liberties, franchises, and privileges to the said office of a common-councilman of &c.

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belonging and appertaining, in manner and form as the said *John Salway* hath in his said second plea in that behalf alleged. Verification and prayer of judgment.

The second (a) replication to the second plea took issue upon the allegation that the major part of the 12 aldermen of &c. for the time being, and of the said 25 common-councilmen, were lawfully assembled together, modo et formâ.

A third replication to the second plea stated, that long before the said supposed election and choice of the said *John Salway* in that plea mentioned, the said Lady *Elizabeth*, late Queen of England, by her letters-patent, under her great seal of England in the said first plea of the said *John Salway* mentioned, did grant and ordain as in that plea is mentioned and set forth; which letters-patent the said then burgesses, of &c. afterwards and long before the said supposed election of the said *John Salway*, to wit, 1 November, 1596, accepted, to wit, at &c. And that under and by virtue thereof, before and at the time of the said supposed election of the said *John Salway*, whenever the office of one of the said common-councilmen had become vacant, the said 12 aldermen and the residue of the said common-councilmen, or the major part of the said 12 aldermen and common-councilmen for the time being, lawfully assembled, had elected and chosen and of right ought to have elected and chosen, and still as when there shall be any vacancy in the said number of 25 common-councilmen of right ought to elect and choose some one other of the burgesses of the said, &c. being an inhabitant thereof, to become and be one of such 25 common-councilmen of the said &c. and the said vacant office of one of the said 25 common-councilmen to enter into and fill, and such burgess being an inhabitant as aforesaid, so elected and chosen as aforesaid, hath been and still of right ought to be sworn and admitted into the said office, and to use, exercise and enjoy, all the liberties, privileges and franchises to the said office of a common-councilman belonging and appertaining.

(a) As to the cases in which the Crown may put in several replica-      tions to the same plea, see *Manu. Exch. Pract.* 2d ed. 108, (r).

The first replication to the third plea took issue upon the alleged user.

The second replication to the third plea stated, that before and at the time of the date and making of the said deed or instrument of surrender in that plea mentioned, the said charter or letters-patent of the said Lady Elizabeth, late &c., had been accepted as in the said first plea is mentioned, and at the time of the date of the making of the said deed and instrument of surrender, was in full force, virtue and effect. Verification and prayer of judgment.

The third replication to the third plea took issue upon the allegation, that the major part of the said aldermen for the time being, and of the said 25 common-councilmen, were lawfully assembled together, modo et formâ.

The defendant joined in demurrer; and to the first replication to the second plea he rejoined, reasserting the prescriptive mode of election. To the third replication to the second plea he rejoined, that since the granting of the said letters-patent of the said Lady Elizabeth, late Queen of England, and before and at the time of the election of the said *John Salway*, whenever the office of one of the said common-councilmen had become vacant, the said 12 aldermen and the residue of the said common-councilmen for the time being, being lawfully assembled, have elected and chosen and of right ought to have elected and chosen, and still as when there shall be any vacancy in the said number of 25 common-councilmen, of right ought to elect and choose some one other of the burgesses of &c., to become and be one of such 25 common-councilmen of &c., and the said vacant office of one of the said 25 common-councilmen to enter into and fill, and such burgess so elected and chosen as aforesaid, for and during all the time last aforesaid, hath been and still of right ought to be sworn and admitted into the said office before the bailiff of &c., and being so elected, sworn and admitted as aforesaid, to use and exercise the said office of a common-councilman, and all the liberties, franchises and privileges thereto belonging and appertaining. Verification and prayer of judg-

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ment. The defendant demurred to the second replication to the third plea.

The prosecutor demurred to the rejoinder to the third replication to the second plea, and joined in demurrer upon the demurrer to the second replication to the third plea.

The defendant joined in demurrer upon the rejoinder to the third replication to the second plea (a).

*Alderson*, for the crown. The question will, ultimately, resolve itself into this, whether the construction of the charter of *Elizabeth* is clear upon the face of it, for if it be so, no evidence of usage is admissible to explain a latent ambiguity. The election must be made from the burgesses and inhabitants, which expression is equivalent to burgesses being inhabitants. The party elected must be an inhabitant at the time of the election. The present case is not distinguishable from that of *Rex v. Heath* (b). There the common-councilmen were directed by the charter to be elected "de discretioribus civibus et inhabitantibus civitatis," the very words used here, and there it was held that a freeman, not being an inhabitant, is not eligible. In the *Queenborough* case, *Rex v. Greet* (c), the words were "burgess or inhabitant," and it was held that an usage restricting the

(a) The following note of the points for argument was inserted in the margin of the defendant's demurrer books: "In support of the demurrer to the second replication to the third plea, it is intended to be argued by the defendant, that the charter of *W. & M.* having granted and confirmed to the corporation of Ludlow the election of officers, and the like liberties, franchises, &c. as the late antecedent corporation had held and enjoyed by reason or pretence of any charter before granted, or by any other lawful right or title, and it being averred and admitted

that for 70 years before the charter of *W. & M.*, the said corporation by reason or pretence of the charter of *Eliz.* had used and enjoyed the mode of election under which the defendant in this instance was elected, the rejoining of the charter of *Eliz.* is altogether immaterial; first, because the mode of the defendant's election was not inconsistent with that charter, and secondly, that if it were, the charter of *W. & M.* had confirmed it as an election or franchise previously existing de facto."

(b) 1 Barnardiston, 416, (Exeter).

(c) *Ante*, ii. 391, 8 B. & C. 363.

election to the burgesses being inhabitants was bad. The Court said, that the introduction of the word "or" instead of "and" made all the difference. If we read "or" here, we should introduce a construction inconsistent with the usage, which has been to elect burgesses only. In *Rex v. Miller (a)*, *Grose*, J. says, "I admit that where there is any doubt in a statute or charter, it may be explained by usage; but there is no doubt on the words of the statute, and if the usage were received here, it would be for the purpose of creating, not explaining a doubt." Even a bye law would not be sufficient to establish such a mode of election. Then if an actual bye law would not do, a usage from which a bye law is to be implied will not.

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*Taunton*, for the defendant. The first point involves the simple construction of the charter. The second raises the question how far usage can be resorted to, whether the replication is sufficient. The third point introduces a question out of the charter of *W. & M.*, which stands upon totally different grounds from the preceding, and if the last plea can be supported, the other pleas become immaterial except with reference to costs. *Rex v. Heath* is not conclusive, since the only point there determined was, whether a quo warranto should issue, in other words, whether the point should be tried or not; and the rule for the information was made absolute, because it appeared to the Court that there was sufficient doubt to entitle the parties to try the question. Inquiry has been made as to what became of that case, and it appears that an information was filed. The plea stated that the defendant was both an inhabitant and a burgess. No trial appears to have been had, nor was any judgment given, nor can any judgment be found. [Lord *Tenterden*, C. J. The defendant in that case did not venture to contradict the prosecutor's case.] The defendant preferred an issue of fact to an issue of law. In old charters, inhabitant of a borough is synonymous with burgess. *Spelman's Glossary*, in verbo "Burg." So White-

(a) 6 T. R. 268, (Northampton).



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locke says, "Burgesses are inhabitants and freemen of boroughs" (a). [Lord Tenterden, C. J. There the word "burgess" is used without reference to corporate capacity. *Bayley*, J. You plead according to the legal effect. You should have said "burgesses" only. The term must be understood according to the meaning which it bore at the period at which the charter was granted. Burgess was then synonymous with townsman, though it is now used to denote a member of a corporation. In Brady (b) is the charter of 7 Ed. 4, to the burgesses and inhabitants of Windsor, in which the "burgesses" and "inhabitants" are the same persons. Burgesses were originally the inhabitants of walled towns. In 1 Barnardiston, 137, Anon. where a charter was granted "civibus residentibus et inhabitantibus de Gloucester," the Court held that non-residence was no ground of amotion, except in the case of a select body, saying that these words made no difference, that being the common form of incorporations. The usage is, therefore, not inconsistent with the charter, and is, therefore, available here. *Rex v. Mayor, &c. of Chester* (c). In *Rex v. Williams* (d) the charter required that the mayor &c. should be inhabitants and residents within the borough on pain of forfeiting 100*l.*, and it was held that non-residence did not disqualify but merely subjected the party to a penalty. There being a specific penalty imposed, would not of itself be sufficient to bear out that decision, for the mayor might live in London without incurring any penalty. [*Bayley*, J. The point there was, whether the election could be supported though they threw out an opinion upon the other point. In the first part of the plea you state that the defendant was a burgess and an inhabitant, you afterwards drop the latter term.] The meaning of the term "inhabitant" may be gathered from

(a) Vol. i. 500, ii. 95. *Burgenses*, *municipes*, *burgorum*, seu *villarum clausurarum incolæ*, vel qui *tenementa in iis possident*, et *ratione eorum Burgagium domino burgi pensitant*. *Ducange*, in verbo.

(b) Brady on Boroughs, 84.

(c) 1 M. & S. 101.

(d) 2 M. & S. 141, (*Caermarthen*).



the statute of Bridges (a), and *Gateward's* case (b). On the second point, upon the third replication to the second plea, that replication states, that any burgess, whether inhabitant or not, may be elected. The rejoinder ought to have stated that none but an inhabitant ought to be elected. If the rejoinder be not bad on that ground, the same question arises as before; and it must be seen how far usage can explain the charter. [Bayley, J. Your rejoinder is consistent with the replication. You do not say that they must choose a burgess, whether an inhabitant or not.] We say burgess generally. This would be the form in which a party would state in his plea a right to elect any burgess. The term burgess includes all, whether resident or not. [Lord Tenterden, C. J. You plead an immemorial usage to elect. They reply that Queen Elizabeth granted a charter, directing the election from the burgesses being inhabitants. Does not that raise the same question as the demurrer to the first plea?] In *Rex v. Mayor, &c. of Chester*, the Court relied upon the usage. [Bayley, J. In that case there was another answer to the objection, viz. that the party had another remedy.] The case was principally decided on the ground of usage. Lord Ellenborough says, incidentally of the conclusion. But that is not the main ground of the judgment. The case of *Gape v. Handley* (c) is exceedingly strong. The charter had given an advowson to the mayor, aldermen and burgesses. [Lord Tenterden, C. J. That was the corporate name, every thing was given to the corporation.] *Blankley v. Winstanley* (d) is an authority to the same effect, shewing the efficacy of usage. Third plea states the surrender to Car. 2, and a charter of W. & M. citing that surrender, and confirming to the corporation all privileges which they had exercised by reason or pretence of any charter. The case is then put upon the usage de facto which had obtained. They replied the charter of Elizabeth. We say that the language of the charter of W. & M. is not limited to the privileges granted

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(a) 22 H. 8, c. 5.

(c) 3 T. R. 288, n.

(b) 6 Co. Rep. 59, b.

(d) Ibid. 279.

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by *Eliz.*; unless the words of the charter of *W. & M.* are to have the effect contended for, they can have no meaning at all. If the words by virtue or pretence are synonymous, then it would come back to the original question raised by the demurrer to the first plea.

*Alderson*, in reply. [Lord *Tenterden*, C. J. The second plea states an immemorial usage. In your third replication to that plea, you set forth the charter of *Eliz.* which directs the election to be made of the more discreet and honest burgesses and inhabitants. You say that controls the prior usage. Mr. *Taunton* contends that the charter of *Eliz.* does not control the usage, because they are not inconsistent. This direction is expressed in affirmative words only. This is, therefore, analogous to the case put by Lord *Ellenborough* in *The King v. Mayor, &c. of Chester*. This is quite distinct from the question as to the construction of the charter. What Lord *Ellenborough* there says has raised a difficulty in my mind.] Lord *Ellenborough* held that the usage and the charter were not inconsistent; there the charter enabled the corporation to elect annually if they thought fit, but did not absolutely require it to be done. The word "possint" is not imperative; but here the party to be elected must fulfil both conditions. *Rex v. Heath* is not distinguishable from the present case. It may be doubted whether the case of *Rex v. Williams* can be supported to the full extent, as it has since been held that that which would be otherwise a qualification is not the less so by reason of its being enforced by a penalty. The crown must succeed if the usage be inconsistent with the charter. If it be held that the charter was for burgesses only, the crown should have taken issue.

In the course of the same term, Lord *TENTERDEN*, C. J. delivered the judgment of the Court. The first question raised by these pleadings depends upon the construction of the statute of *Eliz.* as set out in the defendant's first plea. That charter authorises the election of the common-council out of the burgesses and inhabitants. The

plea goes on to state, that the defendant, being a burgess, was elected, but it does not allege that he was an inhabitant; and the question is, whether a party being a burgess but not an inhabitant is eligible. We think he was not eligible. It is difficult to ascertain the precise meaning of the term burgess in very old charters; perhaps it may not always have been the same. Here, however, the words are "burgesses and inhabitants," and we think it must have been the intention of the queen that the common-council should consist of persons filling both those capacities. And this agrees with the opinion expressed by this Court in *Rex v. Heath*. This being our construction of the charter of *Eliz.*, the next question is, whether the usage is repugnant to that charter. It is true that affirmative words only are used; still, as they purport to describe the persons who shall be eligible, they exclude all others. In the Chester case, it was the opinion of Lord *Ellenborough* that the words there used did not amount to a prohibition; but that case differs from the present. There too, the Court only refused to interfere by mandamus; an election might nevertheless have been made, and the question would be more properly discussed upon a quo warranto. The third question depends upon the charter of restoration, which confirms all usages that had prevailed by reason, pretence or pretext (*a*) of any charter. We are of opinion that this expression being followed by the words "or by any other *lawful* manner, right or title" must be confined to a lawful pretext, and that the utmost effect which can be given to it is to exclude nice criticisms as to the construction of former charters. For these reasons we are of opinion that there must upon all the points be

Judgment for the crown.

(a) "Prætextu" is commonly used in the old entries as equivalent to "virtute." Thus it is not unusual to see an averment of a descent from ancestor to heir "*prætextu* cujus," the heir enters. Here the expression in the original "*de-*

*buerunt uti virtute vel prætextu.*" If these words had been translated "*ought to use by virtue or reason of, &c.,*" it is conceived that the third point would have been considered to be too clear for argument.

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The owner of tithes which are retained by the occupier of the land under composition from year to year, is ratable to the repair of the highways as occupier of tithes.

CHANTER, Clerk, *v.* GLUBB, Clerk, and another.

**THIS** was an action of trespass for seizing and impounding two cows of the plaintiff, to which the defendants pleaded the general issue. The cause came on to be tried at the Summer assizes, 1827 (*a*), before the Lord Chief Justice *Best*, upon mutual admissions of all facts, when a verdict was found for the plaintiff with one shilling damages, subject to the opinion of this Court on the following case:—

Before and at the time of making the assessment hereinafter mentioned, and also before and at the time of the issuing of the warrant hereinafter mentioned, the plaintiff was the lessee for years of the tithes of the parish of Hartland, in the county of Devon, under a grant of them by deed from the impropiators thereof. Under this lease the plaintiff did not take the tithes in kind, nor did he demise or grant them to the respective occupiers of the lands from which they accrued, or to any other person or persons by any deed or deeds, but he compounded for them with the respective occupiers by several parol agreements, under which they retained the tithes accruing on their respective lands to their own use with the remaining nine parts, from which no severance in fact took place. These parol agreements enured from year to year, and were considered and treated by the parties as determinable only by six months' notice (*b*). Under these agreements the tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands, or to the amount of produce in any particular year. The composition moneys of the tithes so retained were, by the agreements, payable half yearly. The assessment above alluded to was a composition in money, in lieu of the statute duty in kind, duly assessed upon the occupiers of lands, tenements, woods, tithes and hereditaments within the said parish, for the amend-

(*a*) Counsel for the plaintiff, *Wilde*, Serjt. and *Manning*.  
*Coleridge*; for the defendants, (*b*) *Vide post*, 337, (*a*).

ment and preservation of the public highways in the same parish, and the plaintiff was therein charged in the sum of 11*l.* 17*s.* as his share and proportion of the said composition, in respect of his occupation of the tithes above mentioned. The payment of the said assessment, the amount of which was not in dispute, was duly demanded and refused. The defendants were at the time of the conviction hereinafter mentioned, and of the issuing of the said warrant, justices of the peace in and for the county of Devon. Upon the complaint of the surveyors of the highways of the parish, the plaintiff was, after due summons, hearing and proof, convicted of the non-payment; and after order and refusal to pay the same, the warrant of seizure was made, and the seizure took place. The action was brought after a month's notice (a), and within the proper time for that purpose. The question for the opinion of the Court is, whether, under the circumstances the plaintiff was liable to the payment of the composition in lieu of statute duty, as an occupier of tithes within the said parish. If the Court shall be of opinion in the affirmative, then a verdict is to be entered for the defendants; if in the negative, then the present verdict to stand.

*Coleridge*, for the plaintiff. It must be conceded that the only mode in which tithes can pass is by deed; though according to Bacon's Abr. (b) a doubt seems to have been at one time entertained, whether a lease of tithes for one year only might not be by parol. The real question, however, is, who is the visible occupier, and how are the surveyors of the highways to ascertain who it is they are to assess. [*Bayley*, J. Must not they know whether the occupier is entitled to nine tenths of the produce or to the whole?] Considerable difficulties might be imposed upon surveyors if they were bound to ascertain the legal title. Suppose a feme covert impropriatrix to have executed a lease of tithes; notwithstanding the apparent title, the lease would be void.

(a) See *Gould v. Hole*, ante, 301.

(b) Bac. Abr. Tythes, (Y).

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It is, therefore, safer to leave it to the surveyors merely to see who in point of fact is actually receiving the tithes. [Lord *Tenterden*, C. J. If *Rex v. Lambeth* is rightly reported in *Strange* (a) there is an end of the case.] From the report of that case in 8 *Modern* (b) it appears that the lessee held under a parol demise. Therefore there could be no ground for charging him. [Bayley, J. There the farmer was considered as every harvest buying his tithes. Do you say that the bargain passes an interest?] The case finds that the occupiers retained the tithes, which shows that they were possessed of an interest in the tithes. [Parke, J. Suppose there had been a modus in this parish, would not the rector have been occupier of the tithes in respect of which the modus was paid, and is this any thing more than a temporary modus?] This question was raised in *Rex v. Justices of Buckinghamshire* (c) but the point was not decided.

*Manning*, contra. *The Queen v. Bartlett* (d) shews that the occupiers of the land compounding for their tithes are not occupiers of the tithes. [He was here stopped by the Court.]

LORD TENTERDEN, C. J.—In strictness there can be no occupier of tithes, certainly not when tithes are compounded for. The word “occupiers,” therefore, in the statute, must be used to denote the person who receives the benefit of tithes.

BAYLEY, J.—It is quite clear in case of poor rates, and it has been lately held in the case of *Rex v. Lacy* (e), that a money payment substituted for tithes by an enclosure

(a) 1 *Stra.* 525.

(b) 8 *Mod.* 61.

(c) 2 *D. & R.* 689; 1 *B. & C.* 485.

(d) 16 *Vin. Abr.* Poor rate (F.) 4.

(e) 8 *D. & R.* 457; 5 *B. & C.*

702; *Rex v. Boldero*, 6 *D. & R.*

557; 4 *B. & C.* 467. And see *Rex v. The London Gas Company*, 2 *M.*

& *R.* 12, 19.

act is ratable *as tithes* to the repairs of the highways (a). Here the owner of the tithes does not grant them away, but excuses the setting of them out. It is in reality selling the tithes.

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LITTLEDALE, J. concurred.

PARKE, J.—The doubts thrown out in *Rex v. The Justices of Buckinghamshire* are removed by the discussion in *Rex v. Lacy*.

Judgment for the defendants (b).

(a) It has been held that no *action* is maintainable by the overseers of the highways against the parties rated, for nonpayment of the sums assessed, there being a specific mode of proceeding pointed out by the act. *Underhill v. Ellicombe*, Macl. & Younge, 450.

(b) Half a year's notice ought to be given to determine a composition for tithes, such notice expiring at the same period of the year as that at which the composition began. *Bishop v. Chickester*, 4 Gwill. 1316, and 2 Brown, Cha. Ca. 161; *Wyburn v. Tuck*, 1 B. & P. 458. And see *Fell v. Wilson*, 12 East, 85. It is true that in *Wyburn v. Tuck*, *Eyre*, C. J. expressed a different opinion, and appears to have said, "The analogy between land and tithe does not appear satisfactory to me; land is either taken on a holding from Lady-day, or from

Michaelmas, or from some other time, and then notice to quit must be given accordingly. But if a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with relation to the manure and cultivation of the land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself, accordingly as he is to pay a composition or to pay in kind." 1 B. & P. 463. The inconvenience here pointed out seems, however, to be even less than that to which every tenant from year to year is exposed, by reason of his liability to be ejected by his landlord, not from a portion, but from the entirety. In either case, the difficulty, whenever anticipated, may be obviated by a special agreement.



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ELIZA CHILD, an Infant, by GEORGE CHILD, her Father and next Friend, v. GILBERT AFFLECK, Esq. and JANE, his Wife.

In an action by a servant for a libel, in the form of a character, it is necessary to shew implied malice, by directly negating the charge, or express malice *aliunde*.

It is no proof of express malice that the master has communicated to the party inquiring, his belief as to misconduct after the plaintiff had quitted his service, nor that he has made a similar communication to persons from whom he received the plaintiff with a good character.

THE declaration stated, that the plaintiff had been employed by the defendant, *Gilbert Affleck*, as his servant maid, and in that capacity had behaved with due integrity, chastity, sobriety, and propriety: that plaintiff had quitted the service of the said *Gilbert*, and had been recommended to and was retained and employed by, and was likely for the future to be retained and employed by and in the service of one *George Seaman*, as his servant, for certain wages to be therefore paid to plaintiff: Yet the said *Jane*, so then being the wife of the said *Gilbert*, well knowing the premises, but contriving and maliciously intending to injure plaintiff in her said character, good name, and reputation, and to bring her into public scandal, infamy, and disgrace, with and amongst all her neighbours and other good and worthy subjects of this realm, and particularly with the said *George Seaman*, and to cause it to be suspected and believed by the said *George Seaman* that plaintiff was not fit to be employed as a servant, and that she was dishonest, lazy, unchaste, and in the habit of conducting herself with insobriety and impropriety, and that she was a loose and profligate person; and thereby to prevent the said *George Seaman* from further retaining and employing plaintiff in his service, and to vex, harass, oppress, impoverish, and wholly ruin plaintiff, and to deprive her of the means of supporting herself by honest and industrious means, on &c., at &c., in a certain letter which the said *Jane* then and there wrote to one *Catherine Seaman*, being the wife of the said *George Seaman*, in answer to certain inquiries which the said *Catherine Seaman* had theretofore made of the said *Jane*, respecting the character of plaintiff, did wrongfully and unjustly compose and publish a certain false, scandalous, malicious, and defamatory libel of and

concerning the plaintiff, as such servant as aforesaid, and of and concerning the habits and conduct of plaintiff after she had left the service of the said *Gilbert*, in substance and to the effect following; that is to say, Mrs. *Affleck's* (meaning the said *Jane's*) compliments to Mrs. *Seaman*, and is sorry that, in reply to her inquiries respecting *Elizabeth Child*, (meaning plaintiff,) nothing can be in justice said in her favour. She (meaning plaintiff) lived with Mrs. *Affleck* (meaning the said *Jane*) but for a few weeks, in which short time she (meaning plaintiff) conducted herself disgracefully; and Mrs. *Affleck* (meaning the said *Jane*) is concerned to add, that she (meaning the said *Jane*) has since her (meaning plaintiff's) dismissal, been credibly informed she (meaning plaintiff) has been and now is a prostitute in Bury, (thereby meaning that plaintiff was a profligate and abandoned person, and not fit to be retained or employed in the capacity of a servant, and also that plaintiff was of a loose, immoral, profligate, and abandoned character.) Allegation of the loss of *Seaman's* place as special damage. Plea, the general issue, not guilty.

At the trial before Lord *Tenterden*, C. J., at the sittings after last Hilary Term, the facts appeared to be these: Mr. *Seaman* having occasion for a servant, applied to an intelligence office at Bury, and, from the account there given of the plaintiff, received her into his service on 14th July, 1827; but finding that she had lived about four months with Mrs. *Affleck*, Mrs. *Seaman* sent Mrs. *Affleck* a letter, which produced the answer set out in the declaration, dated 1st August, 1827, in consequence of which plaintiff was dismissed from *Seaman's* service. Shortly afterwards Mrs. *Affleck* called upon Mrs. *K.*, a person with whom plaintiff had formerly lived as a servant, and told her that she, Mrs. *A.*, had written to Mrs. *Seaman*, and had taken care that plaintiff should not keep her place. She also made a similar statement to the keeper of the intelligence office. General evidence as to the plaintiff's good conduct was given, but

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nothing was proved as to her conduct whilst in the defendant's service. His lordship was of opinion that this was a privileged communication, and directed a nonsuit, which

*F. Kelly* now moved to set aside. There was evidence of express malice, which should have gone to the jury. It was for the jury to say, under the circumstances, whether the letter of August 1st was written bonâ fide in answer to the inquiries which had been made, or whether Mrs. *Affleck* merely availed herself of that opportunity for gratifying her malice. The letter contains no specific charge, which the servant might meet by a direct answer. The defendant should have shewn some secret information, or some such ground of suspicion as the letter alludes to. In some of the cases it is said that the master might know facts which would justify him in giving the character, though he was not in a situation to prove so much before a jury by the testimony of others; but no difficulty of that kind occurred here. In *Blackburn v. Blackburn (a)*, the action for libel was held maintainable, though the jury found that the defendant was not actuated by express malice. *Rogers v. Clifton (b)* seems to be almost this very case. The only difference is the communication was made in that case to *Holland*, the former master.

BAYLEY, J.—It appears to me that the communication was privileged, and that the nonsuit is right. In the cases cited, the misconduct charged had been negatived, whereby a foundation for inferring malice was raised. Here no evidence of malice is given dehors the supposed libel. It is said that Mrs. *Affleck* should not have stated that she

(a) 4 Bingham. 395.

(b) 3 B. & P. 587. But there "the plaintiff proved by the servants of the family, that while in the defendant's service he had

conducted himself well, and that no complaints of the nature ascribed to him in the defendant's letter had all that time existed."

was credibly informed that the plaintiff had misconducted herself after she left the defendant's service; but I think that there is not, upon the face of the letter, any malice. The defendants had received a good character of the plaintiff from her former mistress, and it is far from being a malicious act to make a communication which should have the effect of preventing the former character being set up again as the true one. If it had been proved that the plaintiff had conducted herself with perfect propriety during the whole period, there would have been a case to go to the jury.

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LITLEDALE, J.—I think that there was not sufficient evidence of malice. An injurious statement made in giving a character, though not true, is not actionable without proof of malice. It is said that the latter part of the letter of 1st August shews malice, and that the defendant ought to have confined her statement to what took place in her own house. She certainly goes a little beyond that; but if she had been so credibly informed, it was part of her duty to communicate this information to Mrs. *Seaman*. It is also said, that the expression “disgraceful,” in the letter, implies malice; but the defendant was not compellable to enumerate the particular acts of misconduct upon which her opinion was founded; nor was she bound to name the person who communicated the information to her. Then does what the defendant said on another occasion shew malice? I think not. It does not appear that she went officiously, for the purpose of making the statement to Mrs. K. The case would have been very different if the plaintiff had distinctly negatived the charge, and had shewn that the defendant was actuated by malice.

PARKE, J.—The rule laid down by Lord *Mansfield*, in *Edmonson v. Stevenson* (a), is, that the gist of this action

(a) Bull. N. P. 8.

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must be malice, which is not to be implied from the occasion of speaking, but should be directly proved. Then the question is, whether the plaintiff has produced evidence to lead to the conclusion that there was express malice. No inference of malice is to be raised from the letter itself. The defendant was perfectly justified in giving information as to facts which had occurred since the plaintiff had left her service. There is no evidence of any representation made to any other persons except *Jenkinson* and *Mrs. K.*, and if the statements made to those persons had been officious communications (*a*), they would have been evidence from which the jury might have inferred malice. But the defendant had received characters both from *Jenkinson* and *Mrs. K.*, and therefore she was perfectly justified in communicating her opinion to those persons. In *Rogers v. Clifton* (*b*) there was evidence of good conduct, negating the defendant's charge, and the communication to *Holland* was officious. In *Blackburn v. Blackburn* (*c*) the communication was not in consequence of any inquiry. There it was properly left to the jury to say what really was the occasion of the writing of the letter; here the communication is *prima facie* clearly privileged.

Lord TENTERDEN, C. J.—I entirely concur in what has fallen from my learned brothers.

Rule refused (*d*).

(*a*) So held in *Pattison v. Jones*,  
*ante*, vol. iii. 101, 105, n.; 8 B. &  
 C. 578.

(*b*) 3 B. & P. 587; *ante*, 340.

(*c*) 4 Bingham 395; *ante*, 340.

(*d*) And see *Hargrave v. Le Breton*, 4 Burr. 2425.



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## PARRY v. ABERDEIN.

**ASSUMPSIT** on a policy of insurance. The policy bore date 17 November, 1823, and was effected on goods per the *Isabella*, at and from Trieste to Liverpool, including risk in boats and craft from shore to shore, with leave to load, land and exchange goods, without being deemed a deviation. The insurance was declared to be, 368*l.* on currants, valued at 54*l.* per ton; 350*l.* on red Smyrna raisins, valued at 3*l.* 12*s.* per barrel; 132*l.* on black Smyrna raisins, valued at 1*l.* 15*s.* per barrel; and 40*l.* on figs, valued at 20*l.* per ton. On the 5th December the following memorandum was written on the policy and subscribed by the defendant:—"The sum insured on raisins by this policy is declared to be 642*l.* instead of 482*l.*, and the valuation for the red Smyrna 3*l.* 18*s.*, and for the black Smyrna 2*l.* 14*s.* per barrel." The policy contained the usual warranty, "free from average unless general, or the ship be stranded." The declaration alleged a total loss by perils of the seas. The defendant paid the proper proportion of general average, amounting to 6*l.* 5*s.* 10*d.* per cent., before the commencement of the action. Plea, non assumpsit, and issue thereon. At the trial, before Lord *Tenterden*, C. J., at the London adjourned sittings after Trinity term, 1826, the plaintiff recovered a verdict for 153*l.* 17*s.* 8*d.*, subject to the opinion of the Court upon the following case:—

The defendant subscribed the policy upon which the action was brought for 200*l.* On the 16th of November, 1823, the ship sailed from Trieste for Liverpool, with the goods specified in the policy on board, the property of the persons in whom the interest was alleged. On the following day she encountered a violent storm, which laid her upon her beam ends: three of her crew were drowned, and the remainder saved themselves by clinging to the foretop. On the 19th they were taken off by some fishermen, and carried into the port of Ancona. When they left the ship

A ship being deserted at sea by the crew for the preservation of their lives, the assured on goods abandon. She is afterwards towed into port, but the goods are so much damaged as not to be worth sending to their place of destination:—*Held*, a total loss.

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the whole of her hull was under water, except a small part of her bows. The Master, on his arrival at Ancona, hired a boat to look after her, and on the 20th proceeded to sea for that purpose. On the 21st they picked up her long boat, and concluded from that circumstance that she had foundered; but as they were returning towards Ancona they saw some fishermen who had fallen in with the *Isabella*, and were then towing her into the port of Ancona. She was then in the same state as when the crew had abandoned her, the whole of her hull being under water except a small part of the bows. On the 22d she was towed in this condition into Ancona, and remained with her cargo in possession of the salvors, who instituted a claim of salvage in the Tribunal of Commerce of Ancona. The cargo was placed in the government stores, and the master and crew were not allowed to interfere in any manner with the landing of the cargo. The cargo had been entirely under water for eight days, and when landed was found considerably damaged by the salt water. After the cargo had been landed the crew were obliged to live on shore. The ship was delivered to the captain in the middle of April; no repairs were allowed to be done till the beginning of that month. She required new masts and sails, but her hull was not at all injured. She afterwards proceeded on a voyage to Palermo, and from thence to London. There was no other ship in which the cargo could have been forwarded to England; and if another ship could have been found when the cargo was landed at Ancona, it was so much injured by having been so long under water, that it would have been worth nothing at its port of destination. The cargo was sold by public auction about the middle of April, when security was given to the salvors; it was sold by the agent for *Lloyd's*, who also acted as agent for the ship; and the following is an account of the sums which the articles insured produced, and the charges upon them:—the raisins produced 33*l.* 15*s.* 9*d.*, less freight, 57*l.* 11*s.* 7*d.* The figs produced 19*s.* 7*d.*, less freight, 6*l.* 18*s.* 7*d.* The currants produced

268*l.* 6*s.* 4*d.*, less freight, 51*l.* 6*s.* 6*d.* The salvors claimed 5000 dollars for salvage. The tribunal, in the middle of December, decreed that they should be allowed 1200 dollars, and expenses. The salvors appealed from this decree, but the sum was confirmed in the month of April following. The assured, residing in Liverpool, having heard of what had befallen the ship, and before they heard of her being found again and towed into Ancona, gave directions for a notice of abandonment being served upon the underwriters. The notice was dated at Liverpool on the 11th of December, and was served on the 13th of that month in London, but the underwriters refused to accept the abandonment. On the 12th of December the ship was mentioned in *Lloyd's* list as having been brought into Ancona on the 24th of November. The question for the opinion of the Court was whether the plaintiff was entitled to recover.

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*Campbell*, for the plaintiff. In this case there was a total loss in point of fact at the moment when the crew were compelled to leave the ship, and to abandon her at sea. Notice of the abandonment was given by the assured immediately upon their receiving intelligence of the event. At that time, therefore, the underwriters were liable to pay for a total loss, and the only question is, whether any thing occurred afterwards to vary their liability. That question must be answered in the negative. The ship, indeed, was found, and was towed into harbour by the fishermen, but the goods insured were never placed in a situation to be restored beneficially to their owners. If the effect of the accident had been merely to retard the voyage, the plaintiff could not claim for a total loss, notwithstanding the abandonment, *Anderson v. Wallis* (a); but where there has once been an actual total loss, that cannot be redeemed, unless the property insured be restored beneficially to its owner, *Holdsworth v. Wise* (b). In the case of *Thornely v. Hebson* (c),

(a) 2 M. & S. 240. (b) 1 M. & R. 673; 7 B. & C. 794. (c) 2 B. & A. 513.



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which will, perhaps, be cited on the part of the defendant, there never was a total loss, the ship was never deserted at sea, and the insurance was upon the ship. Besides, in that case some blame was fairly attributable to the owners, which cannot be said in the present case.

*F. Pollock*, *contrà*. This is a case of average loss only. •• The mere circumstance of the crew quitting the ship, however justifiably, does not constitute a total loss. The loss may turn out total, or partial only, according to subsequent events; there cannot, for instance, be a total loss, where the goods ultimately arrive at their place of destination. In this case the goods were warranted free from average, and although they were unquestionably much injured, they still remained in specie, and the mere injury to them cannot make the loss total. *Thompson v. The Royal Exchange Assurance* (a). Neither can the loss of the voyage for the season give the assured a right to abandon and claim for a total loss. *Hunt v. The Royal Exchange Assurance* (b), where that point was decided, and where the principle laid down in *Thompson v. The Royal Exchange Assurance* (a) was recognised. How can it properly be said that there is a total loss, when the result is still uncertain, and where it eventually turns out that the goods are not lost, but restored to the owners? The assured must not be allowed to turn a partial into a total loss, in order to find an excuse for imposing a liability upon the underwriters.

*Campbell*, in reply. In *Wilson v. The Royal Exchange Assurance* (c), where the insurance was, as in the present case, upon perishable commodities, and no vessel could be procured to forward the goods to their place of destination, the defendants were held liable for a total loss, and that expressly upon the ground that the voyage in contemplation was lost; and *Manning v. Newnham* (d), before Lord Mans-

(a) 16 East, 214.

(b) 5 M. & S. 47.

(c) 2 Campb. 623.

(d) 2 Campb. 624, n.

*field*, which is stated in a note to the case last mentioned, is to the same effect.

The case was argued in the course of the last term, when the Court took time for consideration. Judgment was now delivered by,

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Lord TENTERDEN, C. J., who, after recapitulating the facts of the case, thus proceeded:—These being the facts, we are of opinion that the plaintiff is entitled to recover. The present case is not distinguishable from the cases of *Gernon v. The Royal Exchange Assurance* (a) and *Holdsworth v. Wise* (b). The first of those cases was an insurance on sugar; the ship returned in a short time to her port of loading; the cargo was damaged, and not in a fit state to be sent to the place of destination, and the assured abandoned, the whole still remaining in specie, though deteriorated in value. The second of those cases was an insurance on the ship, which sailed from St. Andrew's in America for England, and received so much injury, that the crew abandoned her, and were received on board of another vessel. On the following morning a third vessel met with her, and some men from it went on board, and succeeded in taking her to New York, from which place she came to Liverpool, charged with a heavy sum for salvage, and with another sum requisite to repair some injury sustained in going into Liverpool, the two sums together exceeding the value in the policy. There was an abandonment. The Court held that the loss was total on the desertion of the crew, and that it was not turned into a partial loss by the subsequent events, the effect of which could be of no real benefit to the assured. In the case now before the Court, the ship was deserted by her crew in the utmost distress, carried into a port out of the course of her voyage some days afterwards, and there, with her cargo, detained many months for salvage. The cargo, perishable goods, was so

(a) 6 Taunt. 383; 2 Marsh. 88; (b) 1 M. & R. 673; 7 B. & C. Holt, N. P. C. 49. 794.

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much damaged as not to be worth sending to the place of destination, even if a ship could have been found, and none could be. The assured abandoned after knowledge of the loss, and before intelligence of the subsequent facts had arrived. Can any person say that the goods, although remaining in specie, were not as effectually lost to the assured when the ship was deserted, as if they had then gone to the bottom of the sea; or that the subsequent events produced a restoration of them to the owners? Surely not. This, therefore, is not a mere loss of the voyage and adventure, but, in reality, a loss of the thing insured. In the case of *Hunt v. The Royal Exchange Assurance Company* (a), the ship put back to her port of loading; the principal part of her cargo being flour was undamaged, and might have been sent to the place of destination by another ship at the end of three or four months; so that there was no actual loss of the cargo, and a delay only, rather than a loss, of the voyage. It was held that that was not a case for abandonment; and also, upon the particular facts, that the abandonment was too late. In the case of *Thornely v. Hebson* (b) the ship, which was the subject of the insurance, sustained great damage on her voyage from New York to Hull, and the crew, exhausted by fatigue, were taken on board of another vessel, from which six fresh men went to her, and carried her to Rhode Island, where she was sold to pay the salvage. The assured resided at New York; they might have prevented the sale if they would have paid the salvage: and there was nothing to shew that they were unable to do so. They sent notice of abandonment as soon as they heard of the desertion of the crew, and before they heard that the vessel had arrived at Rhode Island. Under those circumstances, the Court thought that there had not been a total loss before the sale, and that as the owners might have prevented the sale, they could not make the loss total by their own neglect. These last two cases, therefore, are very distinguishable from the present; and our judgment

(a) 5 M. & S 47.

(b) 2 B. & A. 513.

ought to be governed by the first two that I have referred to, and by the sound and legal principles on which they were decided. The postea is to be delivered to the plaintiff.

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Postea to the Plaintiff.

ROBINSON v. HENRY READ.

**ASSUMPSIT**, for board and lodging, clothing, medicine and necessaries provided by plaintiff for defendant, with a count for goods sold and delivered. Plea, non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C.J. at the London adjourned sittings after Trinity term, 1827, the plaintiff obtained a verdict for 216*l.* 17*s.* 10*d.*, subject to the opinion of the Court upon the following case:—

The defendant, in the month of October, 1825, was and is owner of the East India ship called the *Providence*, which arrived from the East Indies in that month, with several *Lascars* who had served on board on the voyage, and whom the first officer in the ship, by order of *Edmund Read*, the brother of the defendant, and who was employed by him as broker and ship's husband for the ship, and in that character received the freight and earnings of the ship, delivered to the plaintiff to be fed and clothed and taken care of, till a ship should be provided to take them back to India, and on that account a debt was incurred, amounting to 146*l.* 16*s.* *Edmund Read*, as such broker and ship's husband, also purchased of the plaintiff, for the use of the ship, slops, bedding, and seamen's clothing, to the amount of 77*l.* 13*s.* 5*d.* After these supplies, the plaintiff delivered to *Edmund Read* his two bills for those amounts, headed respectively as follows:—

*A.*, by taking and renewing the acceptance of *C.*, the agent of his debtor *B.*, does not discharge *B.*, unless *A.* has elected between the acceptance and cash, or *B.* is misled or prejudiced by the arrangement.

“ December 26, 1825.

The Captain and Owners of the East India Ship *Providence*,  
To Frederick Robinson.”

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Here followed the items of the bills, the whole amounting to 224*l.* 9*s.* 5*d.* About the same time the plaintiff had an account against the captain and owners of the East India ship *Darius*, who were indebted to him in 44*l.* 7*s.* 10*d.* *Edmund Read* was also broker and agent for that ship.

A credit of two or three months is usual on such accounts, and the dealings upon which the plaintiff's demand arose were upon credit. Before the expiration of such credit as to any part of the demand, the plaintiff came to *Edmund Read* and said it would be an accommodation to him, the plaintiff, if *Edmund Read* would give him an acceptance for the amount of all the bills, in preference to waiting till they were due. *Edmund Read* agreed to give his acceptance accordingly, on discount being allowed, and the plaintiff deducted, by way of discount, from the 224*l.* 9*s.* 5*d.*, the sum of 8*l.* 3*s.* 7*d.*, reducing the demand to 216*l.* 5*s.* 10*d.*

Discount was likewise allowed by the plaintiff upon the demand in respect of the *Darius*, reducing the aggregate of the demand, in respect of both ships, from 268*l.* 10*s.* to 257*l.* 16*s.* 1*d.*; and for this amount *Edmund Read*, at the request of the plaintiff, accepted a bill of exchange drawn on him by the plaintiff, of which the following is a copy:—

“£257 16*s.* 1*d.*                      London, December 28, 1825.

Three months after date pay to my order two hundred and fifty-seven pounds, sixteen shillings and one penny, for value received.

To Mr. *Edmund Read*.                                              F. Robinson.”

When *Edmund Read* gave the plaintiff this acceptance, he had money in his hands belonging to the defendant to a much larger amount than sufficient to pay the plaintiff's demand. *Edmund Read* then debited the defendant's account with the sum of 216*l.* 5*s.* 10*d.*, but it did not appear that the defendant had seen the books.

On the 31st of March, 1826, when this bill of exchange became due, *Edmund Read* requested the plaintiff to renew it, which the plaintiff agreed to do, interest being added.

*Edmund Read* consented to add interest, and accordingly he accepted a bill at three months, in the same form as the other.

When the second bill became due, it was in like manner renewed for two months, on an agreement to add interest.

At the time of the acceptance of the second and also of the third bill, the balance in the hands of *Edmund Read* in favour of the defendant had increased. He did not debit the defendant with any interest, and he failed soon after the third bill fell due, and was made a bankrupt, and then owed the defendant 5000*l*.

Before the third bill became due the plaintiff indorsed it for value to one *Francis*, and the bill being dishonoured when due, *Francis* brought an action, and arrested *Edmund Read* upon it. *Edmund Read* put in and justified bail.

In October, 1826, *Edmund Read* became a bankrupt, and afterwards obtained his certificate, whereupon the plaintiff took up the bill, and paid *Francis* the principal money, interest, and costs incurred before the commencement of this action.

After the bankruptcy of *Edmund Read*, the defendant was applied to by the plaintiff's attorney for the payment of the plaintiff's accounts, when the defendant said he knew nothing about them, for that he left all matters relating to the ship to his brother *Edmund Read*, who was then making up his accounts. He desired the matter might stand over till the accounts were made up, and, if found to be right, they would be paid.

The question for the opinion of the Court is, whether the plaintiff was entitled to recover. If the Court shall be of opinion that he was, the verdict is to stand; otherwise a nonsuit to be entered.

*Chitty*, for the plaintiff. The defendant was originally liable, for he was the principal, and *Edmund Read* merely his broker and agent; and the question is, whether any thing has been done to release him from that liability. The

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receipt of a bill of exchange accepted by the agent did not discharge the debt originally owing from the principal. At the time when that arrangement was made, there was no option given to the plaintiff, nor any offer made that he should have money if he pleased, instead of the bill. The arrangement produced no change in the situation of the defendant. The agent, it is true, had money of the defendant's in his hands, but the defendant never examined the state of the accounts, nor ever inquired how his agent was dealing with his money. He therefore gave his agent an unqualified power of adjusting the account in any mode he might chuse, and made himself responsible accordingly. Under such circumstances the bill was not payment; *Tapley v. Martens* (a). There A., wishing to send goods to B. at X., employed C. to carry and deliver them to B., and engaged to pay C. for the freight: C., on delivering them according to the order, took a bill of exchange from B. drawn on A., which bill was never paid. It was held that A. was liable to pay the amount of the freight to C., notwithstanding the bill of exchange. Besides, the defendant gave no new credit to the agent in consequence of his having accepted the bills of exchange, and sustained no prejudice by means of the plaintiff having consented to the renewals of the first bill; therefore this case falls directly within the principle laid down in *Wyatt v. The Marquis of Hertford* (b), that if one takes the security of an agent unknown to the principal, and gives the agent a receipt as for the money due from the principal, in consequence of which the principal deals differently with his agent, the principal is discharged though the security fails; but otherwise, if the principal does not shew that he was injured by means of the receipt. In *Everett v. Collins* (c) it was held, that if a creditor is offered cash in payment of his debt, or a cheque upon a banker, and prefers the latter, that does not discharge the debtor if the cheque is dishonoured, although the banker fails with a balance of his principal's in his

(a) 8 T. R. 451.

(b) 3 East, 147.

(c) 2 Campb. 515.

hands to a large amount. *Edmund Read*, the acceptor of the bill, must be considered as the servant of the defendant in this case, as *Mingay & Co.* the drawers of the cheque, were considered as the servants of the defendant in the case last cited. In *Clarke v. Noel (a)* it was held, that the purchaser of goods to be paid for by bill upon his agent, was not discharged by the seller's taking a renewal of the bill, without giving him notice. *Marsh v. Pedder (b)*, and *Taylor v. Briggs (c)*, are authorities to the same effect. There is one case where, under somewhat similar circumstances, the debtor was held to be discharged, which will probably be relied on for the defendant; that is the case of *Strong v. Hart (d)*. But the decision there was grounded on the particular fact, that the creditor took the bill for his own accommodation instead of taking cash, which, it was to be inferred from the case, he might have had if he pleased; and that he did not shew, as it was at all events incumbent upon him to do, that he was unable to obtain payment in cash. Now that is sufficiently shewn in the present case, because the period of credit had not expired when the first bill was drawn, and therefore the plaintiff here cannot be said to have taken the bill as a matter of choice instead of cash: he asked for a bill, it is true, but that was because he had no right to ask for cash, and in order to have the advantage of negotiating the bill, and so putting himself in cash before the credit expired. The bill, therefore, did not operate as payment here. And there was another

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(a) 3 Campb. 411.

(b) 4 Campb. 257; Holt, N.P.C. 72.

(c) 1 Moody & Malk. 28.

(d) 9 D. & R. 189; 6 B. & C. 160. There the captain and part-owner of a ship signed bills of lading making the cargo deliverable to the consignees or their assigns, they paying freight. He delivered the cargo to the consignees, and took a bill for the freight,

which was dishonoured. In an action against the consignors for the freight, it was held, first, that the jury were rightly directed to find for the defendants, if they thought the captain took the bill as a matter of preference and convenience to himself; and secondly, that it lay upon the plaintiffs to prove that he took it from necessity.






(u) 7 D. & R. 690; 5 B. & C. 190. And see *Bedford v. Deakin*, 2 Stark. N. P. C. 178, 2 B. & A. 210, cited in 7 D. & R. 697.

justice; for the creditor can have no right to *two* debtors; and if he resorts to a new debtor for his own accommodation, and a loss ensues, that loss ought in fairness to be borne by him. It is clear from all the facts in the case, that the plaintiff *intended* to make *Edmund Read* his debtor. *Edmund Read* was not agent for the purpose of giving security after the credit had expired; he was agent only for the purpose of paying in cash at the expiration of the credit. The first bill did not become due until after the credit had expired, and the plaintiff consented to its being twice renewed, which he clearly would not have done unless he had considered *Edmund Read* as his sole debtor; and he as clearly entered voluntarily and for his own convenience into the arrangement, for the case finds that he "said it would be an *accommodation* to him if *Edmund Read* would give him an acceptance for the amount of all his accounts, in *preference* to waiting till they were due." The cases cited for the other side are all distinguishable from the present. *Tapley v. Martens* (a), *Marsh v. Pedder* (b), and *Taylor v. Briggs* (c), were all cases of actions founded on charter-parties under seal; a distinction which was pointed out by *Abbott, C. J.*, in his judgment in the case of *Strong v. Hart* (d); and there was no evidence in any of those cases that the bill was given for the accommodation of the creditor, or of his representative, the captain. So in *Wyatt v. The Marquess of Hertford* (e), it did not appear that the plaintiff had sought the arrangement entered into with the agent for his own accommodation. *Everett v. Collins* (f) can be supported as law, if at all, only on the ground that the cheque there given was taken as cash, and being dishonoured could no more operate as a payment than counterfeit guineas or forged bank notes. *David v. Ellice* (g) has no analogy to the present case, for there the question

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(a) 8 T. R. 451.  
 (b) 4 Campb. 257; Holt, N.P.C.  
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 (c) 1 Moody & Malk. 28.

(d) 9 D. & R. 192.  
 (e) 3 East, 147.  
 (f) 2 Campb. 516.  
 (g) 7 D. & R. 690; 5 B. & C. 196.

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was, whether, under particular circumstances, a retired partner continued liable for the debts of the new firm. *Evans v. Drummond* (a) comes nearer to this case, where it was held by Lord Kenyon, that the taking the bill of one partner in a firm in renewal of a former bill given by the firm, discharged the other partners; and *Reed v. White* (b) is expressly in point, because there it was held, that if a person who supplies stores to a ship, of which there are several owners, takes in payment the bill of the ship's husband (a part owner) only, and settles with him alone, he discharges the other owners, *particularly if the bill be renewed*. In *Smith v. Ferrand* (c), where the seller of goods received from the purchaser an order upon his banker for the price, and the latter (with whom money had been deposited to meet that and certain other demands) offered to pay in cash, deducting discount for the period of credit, or by a bill upon a third person, which the seller elected to take, it was held, that though the bill was dishonoured, the seller could not sue the purchaser for the price of the goods. That case is also in point with the present, because it is an authority to shew that the dealing in bills between the plaintiff and *Edmund Read*, after the expiration of the stipulated credit, was a release of all claim upon the defendant, and an adoption of *Edmund Read* as debtor in his stead.

*Chitty*, in reply. There was no real accommodation given to the plaintiff in this case. In *Smith v. Ferrand* (c), the money was offered to the creditor, who chose the bill in preference. That was not the case here. Here the bill was in effect the defendant's bill.

Lord TENTERDEN, C. J.—If the defendant had made it appear that he had sustained any injury in consequence of the arrangement that was made between *Edmund Read*, his agent, and the plaintiff, in respect of the bills, he would

(a) 4 Esp. 89. And see *Smith v. De Silva*, Cowp. 469; *Malkin v. Vickerstaff*, 3 B. & A. 89. (b) 5 Esp. 122. (c) 7 B. & C. 19.

have given the case a very different colour from that which it wears at present. But there is no evidence of that kind in the case. According to the evidence the defendant never examined into the accounts at all, and never inquired in what manner his agent was disposing of his money. The only question, therefore, is, whether the mode of dealing resorted to between the creditor and the agent had the effect of discharging the principal debtor, or, in other words, whether the agent is to be considered as having paid the debt. The only case bearing affirmatively upon that question is that of *Strong v. Hart (a)*, which, however, is perfectly distinguishable from the present, because there it was taken for granted that the creditor might have had money if he had preferred to do so. But here the creditor had no such option. He was in the first instance obliged to pay for the bill by allowing the discount upon it, and was unable to obtain money; and even when the bill arrived at maturity, the utmost he was able to obtain was a renewed bill. From such a mode of dealing the plaintiff derived no advantage, for it cannot be deemed an advantage to obtain a bill which, after two renewals, is at last dishonoured; and the defendant sustained no injury. I am, therefore, of opinion that there has been no payment of the debt in this case; that the defendant, the original debtor, is still liable; and that the plaintiff is entitled to recover.

BAYLEY, J.—In all transactions of this nature it is in the power of the principal to call upon his agent to produce vouchers for the sums which he charges as paid; and it is his duty to do so. Here the defendant never called for any vouchers, and never examined the accounts; and I think it impossible to consider him as having been at all placed in a worse situation by the plaintiff's taking the bills from *Edmund Read*. Mr. *Campbell*, in the early part of his argument, seems to have referred to a case of *Embleton v. Bremer*, which I believe is nowhere reported, but which

(a) 9 D. & R. 189; 6 B. & C. 160.



clearly not : there may be some evidence tending that way, but certainly not enough to justify us in drawing such a conclusion. In *Reed v. White*(a) that question was left to the jury ; but I cannot help believing, from the nature of the report, that there were other circumstances in that case not noticed by the reporter, which might have gone the length of establishing something equivalent to payment. Here there was really nothing but the single circumstance of the plaintiff's taking the bill ; which, alone, does not amount to payment either in fact or in law, and does not furnish a legal answer to the plaintiff's claim.

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Judgment for the plaintiff (b).

(a) 5 Esp. 122.

(b) And see *ante*, vol. i. 562, (a).

WANSSELL v. SOUTHWOOD.

THIS cause having been referred to arbitration by an order of nisi prius, a witness, who had been regularly served with a subpoena, and who was a material and necessary witness on the part of the plaintiff, refused to attend and give evidence before the arbitrator. Upon an affidavit of these facts,

This Court will not compel a witness to attend before an arbitrator, although the reference be by order of nisi prius.

*Chitty* moved for a rule to shew cause why the Court should not make an order commanding the witness to attend. [*Bayley*, J. (the only Judge in Court,) Is there any instance of the Court having made such an order?] No instance of the kind, certainly, is to be found ; but the application, though novel, seems to be founded in reason and justice. A witness attending before an arbitrator has the same privilege as a witness attending before any of the superior Courts ; he is protected from arrest eundo, morando, et redeundo ; *Randal v. Gurney*(c), *Ricketts v.*

(c) 3 B. & A. 252 ; 1 Chitt. R. 679.

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*Gurney* (a): he ought, therefore, to be under the same obligation to perform his duty. The principle upon which he enjoys the privilege from arrest is, that public justice, which is of higher importance than the private claim of his creditor, requires his free and unshackled appearance in Court; a principle which applies equally to his appearance before an arbitrator. The arbitrator in this case was the delegate and representative of the Court, by order of which the reference was made; and the refusal of the witness to attend and give evidence before him, was a contempt of the Court itself. Unless a witness is compellable to attend in such a case, the order of reference becomes a nullity; a result which the Court will surely interfere to prevent, by exercising its authority to give effect to the reference made by the order of one of its own Judges.

BAYLEY, J.—It is admitted that there is no precedent for making the order prayed for. Now it is quite impossible to suppose that in the course of the one hundred and thirty years which have elapsed since the passing of the statute 9 & 10 W. 3, c. 15, which originated such references (b), many instances have not occurred in which the Court would have been called upon to exercise its power in the mode now proposed, if it possessed the power by law. That circumstance alone would induce me to refuse this application, because I should deem it unadvised, now for the first time, to set up such a precedent. But, in addition to that, I *believe* the Court has no power to make such an order.

Rule refused.

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| <p>(a) 7 Price, 699; 1 Chitt. R. 682.</p> <p>(b) q. d. even where no cause is</p> | <p>depending, the power to refer to arbitration by order of nisi prius being at common law.</p> |
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## Ex parte SUSANNAH SCOTT.

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**CHITTY** had obtained a rule nisi for a habeas corpus to bring up the body of *Susannah Scott*, a prisoner in the custody of the Marshal, for the purpose of her being discharged out of custody. The affidavits stated that a true bill had been found against the prisoner upon an indictment for perjury, and that Lord *Tenterden*, C. J., had granted a warrant for her apprehension, to compel her to appear and plead to the indictment; that one *Ruthven*, a police officer, to whom the warrant was specially directed, apprehended the prisoner at Brussels; that the prisoner applied to the British ambassador there, who declined interfering; and that *Ruthven* conveyed her from thence to Ostend, and so to England, and finally before Lord *Tenterden*, who committed her to the King's Bench prison, for want of bail.

A British subject, arrested abroad, under a warrant upon an indictment for a *misdemeanour*, brought in custody to England, and there committed to prison, is not entitled to be discharged. Per Lord *Tenterden*, C. J., and *Parke*, J., dubitante *Lit- tledale*, J.

*Brougham* and *Platt* shewed cause. There is no ground for discharging this prisoner. A true bill has been found against her for a misdemeanour, and as she either could not or would not find bail when she was committed, there can be no doubt that she is now lawfully in custody. The only ground on which this rule could have been obtained, must be that the prisoner was unlawfully arrested in the first instance; but as she is now clearly liable to be detained upon a criminal charge, the Court will not inquire into the means by which she was originally apprehended. *Rex v. Marks*(a), Ex parte *Krans*(b). If a writ of habeas corpus had been granted in the first instance, the facts already adverted to would have formed a good return, for on a return to that writ it is sufficient for the gaoler to shew the warrant for the detention of the prisoner, he is not bound to set out the caption. The practice in civil and criminal cases has always proceeded upon this distinc-

(a) 3 East, 157.

(b) 2 D. &amp; R. 411; 1 B. &amp; C. 258.



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tion. In civil cases the Court will inquire into the means by which the arrest was effected, and will discharge the prisoner if improper means appear to have been resorted to; *Lyford v. Tyrrel* (a), *Spence v. Stuart* (b): in criminal cases the Court will do neither, because public justice requires that the party, being in custody upon a criminal charge, should be detained, whatever means may have been used to place him there (c).

*Chitty*, in support of the rule. It is admitted, and could not indeed be denied, that in arrests upon civil process the rule laid down in the two cases last cited has always been adhered to. It is true that in the case of *Rex v. Marks* (d) and *Ex parte Krans* (e) this Court did refuse to discharge the parties on account of defective commitments, but the answer to the argument thereon founded is, that in both those cases the prisoners were charged with felony. In the present case the prisoner, a female, is charged with a misdemeanour only, and in favour of the liberty of the subject the Court will think it right to abstain from extending to cases of misdemeanour a rule which, hitherto, certainly, has been confined to cases of felony. The arrest in this case was illegal in every point of view, being contrary at once to the law of this country, to the law of Belgium, where it was effected, and to the law of nations. In *Rex v. Marks* (d), the reason for the Court's refusing to bail, and remanding the prisoner, was, that although the warrant of commitment was informal, the corpus delicti appeared in the depositions (f); therefore, independently of the distinction between cases of felony and of misdemeanour, that

(a) 1 Anstr. 85.

(b) 3 East, 89.

(c) In *Rex v. Horner*, Cald. 295, it is said, "The Court of King's Bench, upon an application to bail, require to see the depositions, and will from thence, if they see just cause, discharge, bail, or re-

mand the prisoner, without regarding the regularity or irregularity of the commitment." That, however, was a case of felony.

(d) 3 East, 157.

(e) 2 D. & R. 411; 1 B. & C. 258.

(f) Vide *Rex v. Horner*, *suprà* (c)

case is inapplicable to the present. In *The Attorney-General v. Carl Cass* (a), the Court of Exchequer discharged a prisoner detained in custody under legal process, issued while he was in gaol under an arrest which was originally illegal.

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LORD TENTERDEN, C. J.—The case last referred to was an information for penalties under the revenue laws, a proceeding which, though criminal in its form, is in its nature more like a civil action to recover a debt (b), than a criminal prosecution to inflict punishment upon an offence against the public. With this observation I may dismiss that case. As regards the case now before us, I think the question should be considered precisely in the same way as if the prisoner were now brought into Court under the warrant granted for her apprehension; for certainly she ought not to sustain any prejudice now from the circumstance of her having been committed by me on a former occasion. Now the question is shortly this:—whether, if a party charged with a crime is found in this country, it is the duty of this Court to take care that he shall be rendered amenable to justice; or whether the Court is bound to inquire into the circumstances attending his apprehension, and under which he was brought into this country. I thought on the former occasion that I could not properly enter into such an inquiry, and I am of the same opinion still. If the arrest was made in violation of the law of Belgium, the authorities of that country might have interfered to vindicate their own law. If it was made in violation of our law, the prisoner has a right of action, and may pursue her legal remedy. I am free to confess that I am not aware of any instance in which the government of a foreign country have interposed to assist in the apprehension and the bringing hither a person charged with a misdemeanour only. In cases of felony, however, I know that it has been done

(a) 11 Price, 345.

in personam, *vide Attorney-General*(b) As to the king's action of debt in the form of an information *ral v. Aldersey*, 1 East, 341; Mann. Exch. Pract. 2d ed. 193 (g), 201.

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more than once, for I have myself granted the warrant for the apprehension of the party accused; and, for this purpose, I do not know how to distinguish between one class of crimes and another: the same principle appears to me to apply equally to both. I am, therefore, of opinion that this rule ought to be discharged.

LITTLEDALE, J. (a).—I entertain great doubts upon this question, which appears to me one of very considerable importance. That persons accused of felony have been apprehended under circumstances similar to those in the present case, I am aware, and I think properly so; but it is another thing to say that such a practice shall extend to every case of misdemeanour, however trifling,—for where can the line be drawn?—and that a party charged with a common assault in London shall be arrested at Paris or St. Petersburg, and brought back hither in custody. I repeat that I very much doubt whether, upon any sound principle of general justice or of national law, the authorities of Belgium ought to have allowed an English subject, charged with a misdemeanour here, to be apprehended in their dominions. Upon the whole, and as at present advised, I incline to think that they ought not, and that the prisoner, having been apprehended under such circumstances, ought to be discharged.

PARKE, J.—Upon the best consideration that I have been able to give this question, which is certainly of importance as regards the liberty of the subject, I concur with my Lord Chief Justice in the view he has taken of it. When a party is solemnly charged upon the oaths of a grand jury with the commission of any offence against the public, whether a felony or a misdemeanour, and is found in custody in this country, I think that public justice requires, and that it is the duty of this Court to provide, that if he cannot find bail he shall be detained in custody to answer that charge: and that, without inquiring into the cir-

(a) *Bayley, J.*, was gone to chambers.

cumstances under which he was taken into custody. If such a party has been really illegally arrested, he has his remedy for that wrong by action; but he is not to be allowed the opportunity of escaping and altogether eluding public justice, merely because there was some irregularity in his original apprehension.

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Rule discharged.

The KING v. The Commissioners of Sewers for the  
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THIS was a rule calling upon the commissioners of sewers for the limits of the Tower Hamlets to shew cause why a writ of certiorari should not issue, directed to them, to remove into this Court a certain presentment made by a jury at a Court of Sewers holden within the said limits, and delivered to the said Court of Sewers, concerning sewers and other works within the several limits of the said district; and also a certain order for a rate made by the said commissioners at two shillings in the pound over the whole of the said Tower Hamlets, founded on the said presentment. The affidavits disclosed the following facts:—

Where a district, within one commission of sewers, is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated.

The commissioners of sewers for the Tower Hamlets have always acted under one commission for the whole district, and their commission has always been in the form set out in the statute of sewers, 23 *Henry* 8. From the earliest period at which commissions of sewers have been granted for that district down to 1821, the commissioners treated it as containing six different levels or lines of large leading sewers; and in all presentments of juries made touching the sewers within the said limits, and in all rates imposed by the commissioners pursuant to such presentments, the juries and the commissioners always acted upon the acknowledged principle that there were six dif

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ferent levels or lines of large leading sewers in the said limits; and always, in such presentments and rates, divided the said limits into six different levels or districts, making each district liable to the repair of those sewers only from which it derived benefit. Down to 1821, separate presentments, by different juries, at distinct periods, and separate rates, were always made for each of the six different levels or lines of large leading sewers, not contemporaneously, but as circumstances required, and the rates were different and separate in amount, and the rates and presentments were made at different times, as the state of repair of the sewers in each level required them. The names of the owners or occupiers of premises in each level, who were benefited by the sewers in that level, were always set out in a schedule annexed to each presentment. Down to 1815, the accounts of the different levels were kept separate and distinct, but since that time they have all, by order of the commissioners, been kept in one general account. Ever since 1821, the commissioners have been endeavouring to establish one general and equal rate over the whole limits. In 1825, they empannelled a jury to make one general presentment of all the sewers within the whole limits, and made an equal rate for the whole limits. That rate was quashed for informality. In 1828 another general presentment was made, and another equal rate was made, over the whole limits. This was resisted by the inhabitants of the parish of Hackney, one of the six levels, who had always before been presented and rated separately for the repairs of the sewers within their own level, which were maintained at a much smaller expense than the sewers in the other five levels, from which they derived no benefit, the chief part of the drainage in the parish of Hackney being by means of a natural brook, and some small branch sewers communicating with it, and which were entirely distinct from, and unconnected with, the sewers of the other five levels.

The case was argued on a former day in this term by

*Sir J. Scarlett, Gurney, Curwood and Chitty*, in support of the presentment and rate, and by

*Tindal, S. G., Campbell and Brodrick*, in support of the rule for quashing the same; but it is deemed unnecessary to insert their arguments here, as all the points made, and all the authorities cited, are fully noticed in the judgment of the Court, which was now delivered by

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LORD TENTERDEN, C. J.—This was an application for a certiorari to remove into this Court a rate made by the commissioners of sewers for the Tower Hamlets, in order to its being quashed. The rule was applied for on the part of the inhabitants of the parish of Hackney, and the objection made to the rate was, that the rate was imposed upon the whole district under the jurisdiction of these commissioners, namely, the whole district of the Tower Hamlets, ratably and proportionably; whereas it was contended, the rate ought not to be made generally upon the whole district, but ought to be, as until a very late period indeed it had been, so far as the books and records of the commissioners go, a rate made separately upon several distinct parts of this district, called, or usually denominated, levels. It appeared upon the affidavits that the parish of Hackney, with the exception of a very small part, was so situated that its drainage was into a natural brook which communicated with the river Lea, so that the drainage of that district could be carried on, and had in fact been carried on hitherto, at a very moderate expense. The other levels of the district, which lay nearer to the river Thames, and which were more populous, and great parts of them entirely covered with houses, were drained by means of covered sewers, erected and maintained at a very heavy expense; and it was contended that it was unjust to charge

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the inhabitants of Hackney, who derive no benefit from those expensive sewers, with the maintenance of them, but that they ought to be separately rated, as they previously had been, in which case the burthen on them would be much lighter: whereas the rate in question had the effect of charging them with the maintenance of sewers from which they derived no benefit. In support of the rate it was contended, not that the fact was not as alleged by the parties applying; but that by law the commissioners of sewers of this district, called the Tower Hamlets, could not do otherwise than make one equal pound rate upon all lands and all tenements within the district over which their commission extends: that they were bound by law so to do. Now it is certain that if any such obligation did exist by law, the law would in this case, and probably in many others also, work considerable injustice. It was suggested to us at the bar, and the two cases that I shall mention were instances of it, that in many other districts the rate is made, not upon the whole district, but that, under the authority and jurisdiction of the commissioners, the district is divided into several parts, which are usually denominated levels, and the inhabitants of each particular level are charged with the maintenance of the sewers within that level, which are the only sewers from which they derive benefit. If, therefore, we should hold this rate to be good, we should not only overturn that practice which has prevailed in this district called the Tower Hamlets for many years down to a very recent period, but we should also be deciding in all the other cases in which separate rates are made for separate and distinct levels, that all those rates are bad and ought to be quashed. It appeared to us to be very important that we should, at least, be sure we did right before we came to such a decision, and, therefore, we took time to consider of it; and upon consideration, we are all of opinion that the law is not, as was contended in support of this rate, but that it is competent to persons acting under this commis-

sion to do that which was formerly done in this district, and still continues to be done in many others, namely, to subdivide their districts, and rate the inhabitants of the separate parts separately; so that the inhabitants of each part may contribute to the expense of maintaining those sewers only from which they derive benefit. This is perfectly consistent with the principle which has always been laid down and generally acted upon. I do not speak now with reference to this particular question, which is now raised for the first time. The principle always laid down and generally acted upon is, that no person is to contribute to the expense except those who derive profit or benefit from it. This general principle is very distinctly noticed in *Rooke's case* (a). The point now before the Court was not the point in question there; the point there was, whether a particular person, the owner of particular land, a plot of seven acres, which had usually maintained a particular bank, was alone bound to repair the bank; or whether the obligation to repair should be cast upon the owners of a district containing about 800 acres, which was said to be within the same level, and protected by the bank. The point decided was, that it ought to be cast upon all the occupiers of all the 800 acres that were within the level. Reference was there made to the statute of 6 Hen. 6, c. 5, which is one of the old statutes of sewers prior to the statute of 23 Hen. 8, c. 5; and the language of that statute is somewhat different from the language of that of 23 Hen. 8, c. 5, and perhaps shews more distinctly the power of the commissioners as well as their duty, (for their powers and their duties are equivalent,) to rate separately according to the maintenance of the particular works or sewers from which the parties derive benefit. The direction in the statute is, "No person shall be exempt from the rate, whatever his estate or condition may be, whether he be rich or poor, or of whatever condition, estate, or dignity he may be, who derives or receives defence, profit or protection from the aforesaid walls,

(a) 5 Co. Rep. 99, b. 2d resolution.

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ditches, gutters, barriers, causeways," and so on. Not that all who derive benefit from the works *within the district*, but that all who derive benefit from the particular works there mentioned, shall be chargeable to them. That case also furnishes an instance, and is one of those to which I before alluded, of the commissioners of a large district subdividing their rates into parts on particular levels; for the rate in *Rooke's* case was made by commissioners who had a commission to survey all walls, and so forth, in the River of Thames, in the counties of Essex and Kent. Now if they had been bound to make one entire rate, the inhabitants of the county of Kent on one side of the Thames might have been charged with the repairs of sewers and drains which were in the county of Essex on the other side; and it is quite impossible to suppose that any thing of that kind should have taken place. There is another case which it may not be improper to mention, that of *Stafford v. Hamston* (a). There a rate was made by the commissioners of sewers for the city and liberty of Westminster, and the parish of St. Margaret was rated by a separate rate by those commissioners, being one of the parishes within their jurisdiction. The sewer, towards the expense of which the plaintiff was assessed, was in the parish of St. Margaret. The plaintiff was an inhabitant of Knightsbridge, and she derived no benefit from the sewer to the repairs of which she was charged. It was held that it was competent for her, in an action of trespass brought against the person acting under the warrant of the commissioners, to prove that fact, and evidence of the fact having been rejected at nisi prius, the Court granted a new trial. The case of *Netherton v. Ward* (b) supplies another instance in which the commissioners had subdivided their district; and in that of *Masters v. Scroggs* (c) it was conceded that the person assessed was not liable, unless he actually derived, or was likely to derive benefit from the works

(a) 5 J. B. Moore, 608; 2 Brod. & Bingh. 691.

(b) 3 B. & A. 21.

(c) 3 M. & S. 447.

towards the expense of which he was charged. There the commissioners of sewers had assessed a person in respect of drains which communicated with other drains that fell into the main sewer; but in point of fact the level of his drains was so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises; and, therefore, as he was not, and did not appear likely to be benefited by the works, he was held not liable to the assessment. For these reasons, therefore, without going further into the subject, we are of opinion that the commissioners have done wrong in making one rate for the whole district, which would work the injustice to which I have alluded. It was competent for them by law to rate separate parts within their jurisdiction and authority, in the same manner as had been long previously done. A great deal of reliance was placed in the argument on the word "level," which is found in the report of *Rooke's case*(a), and in which it is said that all who are within the *level* are to contribute. That is very true; but the question is what is the meaning of the word "level." Now that word does not occur in the act of parliament; neither is it to be found in the commission. If we were to understand the word "level" in the sense sought to be attributed to it in this argument, we should make it an artificial division of the land; whereas, according to its natural import, the word denotes, not an artificial division of the land, but the peculiar natural character and situation of it. So understood, all those cases, and all those expressions, which shew that the rate is to be made equally upon all the inhabitants of the level, will stand untouched by our decision. The rule, therefore, for the certiorari must be made

Absolute.

(a) 5 Co. Rep. 95, b. The word "level," though used in the special verdict in that case, does not appear to be adopted by the Court. The resolution there is, "that the statute will have all who are in

danger and are to receive benefit (*et que sont a prendre commodité*) by the making of the banks to be contributors; for *qui sentit commodum sentire debet et onus*."

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GREVILLE v. ATKINS and another, Executor and Executrix of KEENE, deceased.

Where, after the recital of the appointment of *A.* to be deputy to *B.* in the execution of an office within the purview of 5 & 6 Ed. 6, c. 16, or 49 G. 3, c. 26, *A.* paying *thereout* to *B.* an annual sum, the condition of the bond in suit is stated to be for the payment by *A.* to *B.* of such annual sum generally, it is a good plea in bar to say that the bond was given in pursuance of an agreement to pay such sum *absolutely and at all events*.

Semble, that the condition taken per se shews the bond to be given upon an illegal contract (*a*).

**DEBT** on bond. The bond was executed by the testator on the 4th January, 1822, and was in the penal sum of 2000*l.* subject to a condition, by which (after reciting that *Greville* was colonial secretary of the island of Tobago in the West Indies, and had appointed *T. B. Manning* his deputy to execute the duties of the office in the island of Tobago, and to receive the fees and emoluments thereto belonging, in consideration of *T. B. Manning's* paying and allowing *thereout* to *Greville* the annual sum of 450*l.*, to be paid as thereafter mentioned; and that *A. Manning* and *Keene* had agreed to become the sureties of *T. B. Manning* for the due and punctual payment thereof,) the condition of the bond was declared to be such, that if *T. B. Manning*, and *A. Manning* and *Keene* as such sureties, or any of them, their or any of their heirs, executors or administrators, did and should from thenceforth yearly and every year during so long time as *T. B. Manning* should hold the appointment of deputy colonial secretary of the island of Tobago under *Greville*, and until the death, retirement, or dismissal of *T. B. Manning*, well and truly pay or cause to be paid to *Greville*, his executors, administrators and assigns, the annual sum of 450*l.*, by even and equal half-yearly payments, that is to say, on the 1st February and 1st August in each and every year, the first payment thereof to begin and be made on the 1st August then next ensuing, together with a proportionate part of the annual sum of 450*l.* as should accrue due between the last half-yearly payment next preceding the death of *T. B. Manning*, or his retirement or dismissal from the office, and the time of his death, retirement or dismissal,

(*a*) In this view of the case, the condition being recited in the declaration, or set out upon oyer, the defendant might have demurred to the declaration; or if upon the

special case the Court had pronounced judgment for the plaintiff, it would have been error on the record, in whatever way the jury had found the agreement.

without any deduction or abatement for or by reason of any taxes or other matter whatsoever; or if *A Manning* and *Keene* should give to *Greville* six months' notice in writing of their intention to withdraw (a) their security and liability to pay the annual sum of 450*l.*, and should pay to *Greville* all sum or sums of money that should be due to him under or by virtue of the bond at the expiration of such notice, then the bond should be void.

Pleas:—First, non est factum testatoris.

Secondly, that the office of colonial secretary of the island of Tobago in the condition mentioned was, at the respective times of the supposed bargain and sale hereinafter next mentioned, and of the execution of the bond by the testator, an office in the gift of the crown, and the island of Tobago one of his majesty's colonies; that before the making of the bond, it was corruptly, and against the form of the statute &c., agreed by and between *Greville* and *T. B. Manning*, *A. Manning* and *Keene*, that *Greville*, being such colonial secretary of the island of Tobago, should appoint *T. B. Manning* his deputy to execute the duties of the office, and to receive the fees and emoluments thereto belonging, on condition of *T. B. Manning* paying and allowing *thereout* to *Greville* yearly and every year, during so long time as *T. B. Manning* should hold the appointment under *Greville*, the sum of 450*l.*, by even and equal half-yearly payments, the first payment thereof to begin and be made on the 1st August then next ensuing; together with a proportionate part of the sum of 450*l.* as should accrue due between the last half-yearly payment next preceding the death of *T. B. Manning*, or his retirement or dismissal from the office, and the time of his death, retirement or dismissal, without any deduction or abatement for or by reason of any taxes or other matter whatsoever; and that such payments should be secured by the joint and several bond of *T. B. Manning*, and of *A. Manning* and *Keene* as sureties of *T. B. Manning*, for the due and punctual payment thereof; and that afterwards, in

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(a) *Vide Calvert v. Gordon*, ante, vol. iii. 125.

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pursuance of such agreement of bargain and sale, *Keene*, as surety for *T. B. Manning*, executed the bond.

Thirdly, the same, only omitting the allegation that the money was agreed to be paid out of the fees and emoluments of the office.

Fourthly, that the office of colonial secretary of the island of Tobago before and at the time of the supposed corrupt agreement, bargain and sale hereinafter next mentioned, and at the time of executing the bond, was an office in the gift of the crown, and that before the making of the bond *Greville*, being such colonial secretary, did corruptly and against the form of the statute &c., bargain and sell to *T. B. Manning* the deputation of his office of colonial secretary, and the fees and emoluments thereto belonging, on condition of *T. B. Manning* paying to *Greville* yearly and every year, during so long time as *T. B. Manning* should hold the office under *Greville*, the sum of 450*l.* without any deduction or abatement whatsoever; and that afterwards, *Keene*, in pursuance of such supposed corrupt bargain and sale, and as surety for the due payment by *T. B. Manning* of the sum of 450*l.*, executed the bond.

Fifthly, that the office of colonial secretary before and at the time of the supposed corrupt agreement, bargain and sale hereinafter next mentioned, and at the time of executing the bond, was an office touching and concerning the execution of justice in the island of Tobago; concluding like the fourth plea.

Sixthly, the same as the fourth, except in describing the office as one touching and concerning the clerkship of the Court of Common Pleas in the island of Tobago, and occupied there in the said Court of Common Pleas, being a court of record wherein justice was administered in the island.

Seventhly and eighthly, that the bond was obtained by fraud, covin, and misrepresentation.

Replication, joining issue upon the first plea; denying the alleged corrupt agreements in the second, third, fourth, fifth, and sixth pleas respectively mentioned; denying also

the alleged fraud and covin in the seventh and eighth pleas mentioned; and suggesting breaches under the statute.

Rejoinder, joining issue upon all those denials.

At the trial the jury found for the plaintiff on the first, seventh, and eighth issues; and a verdict was taken also for the plaintiff upon all the other issues, subject to the opinion of the Court upon the following case:—

The plaintiff being colonial secretary of the island of Tobago, under letters-patent heretofore granted by the crown under the seal of the island, whereby he had been constituted and appointed such secretary, to hold and exercise such office by himself or *his sufficient deputy*, shortly before the execution of the above mentioned bond, agreed with *T. B. Manning, A. Manning and Keene*, to appoint the said *T. B. Manning* his deputy to execute the duties of the said office of colonial secretary, and to allow him to receive the fees and emoluments thereto belonging, on condition of the said *T. B. Manning* paying at all events to the plaintiff the sum of 450*l.* yearly during the period, by the payments and at the times in the condition of the bond respectively mentioned. In pursuance of this agreement, the bond in question was executed by the defendants' testator as one of the sureties of *T. B. Manning*, who was appointed deputy, and continued in the enjoyment of the office of deputy colonial secretary, and in the receipt of the said fees and emoluments, from the 15th April, 1822, till the 15th September, 1823, when he was dismissed from his said office.

The jury found that the sum of 450*l.* a year was to be paid absolutely, whether the fees were more or less, and that the fees of the office did, after deducting the expenses, exceed the sum of 450*l.* annually.

*Platt*, for the plaintiff. The main question in this case will be, whether the bond sued upon is or is not void within the provisions of the statute 5 and 6 *Edw. 6*, c. 16(*a*). It

(*a*) Sect. 2 of which enacts, "that hereafter bargain or sell any office if any person or persons at any time or offices, or deputation of any

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is submitted that it is not. The proper rule for the construction of the statute, and for ascertaining whether a particular transaction is or is not within its operation, is very clearly laid down in the case of *Godolphin v. Tudor* (a). The Court there said, "Where an office is within the statute, and the salary is certain, if the principal make a deputation, reserving a lesser sum out of the salary, it is good. So, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good. For in these cases the deputy is not to pay unless the profits rise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to the fees, they still continue to be the principal's: so that as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is, not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events, and such bond is void by the statute." Here the agreement was to pay 450*l.* a year out of the fees and emoluments of the office; therefore the

office or offices, or any part or parcel of any of them, or receive, have, or take any money, fee, reward, or any other profit directly or indirectly, or take any promise, agreement, covenant, bond, or any assurance to receive or have any money, fee, reward, or other profit directly or indirectly, for any office or offices, or for the deputation of any office or offices, or any part of any of them; or to the intent that any person should have, exercise or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them; which office or offices, or any part or parcel of them, shall in any wise touch or concern the administration or execution of justice, or the receipt, controlment or payment of any of

the king's highness' treasure, money, rent, revenue, &c., or which shall concern or touch any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered: that then all and every such person and persons shall lose and forfeit all his and their right, interest and estate of, in, or to any of the said office or offices."

And sect. 3 enacts, "that all and every such bargains, sales, promises, bonds, agreements, covenants and assurances as be before specified, shall be void to and against him and them by whom any such bargain, sale, bond, promise, covenant or assurance shall be had or made."

(a) 2 Salk. 468; confirmed in Dom. Proc. 1 Bro. P.C. 2d ed. 135

bond is good, within the very language of the Court in that case. The same distinction was acted upon in the case of *Culliford v. De Cardonell* (a), where the Court said, "This bond is not within the statute, because the condition is not to pay him so much in gross, but half the profits, which must be sued for in the principal's name; for they belong to him, though out of them a share is to be allowed to the deputy for his service." But the statute 5 & 6 *Edw.* 6, c. 16, does not extend to the colonies, *Blankard v. Galdy* (b), therefore the question arises whether the recent statute of 49 *Geo.* 3, c. 126, which does extend to the colonies, has any effect upon the bond in this case. Now the latter statute contains no provision for avoiding securities given in cases like the present; it merely enacts, in section 1, that all the provisions in the former act contained shall extend and be construed to extend to all offices in the gift of the crown or of any office appointed by the crown: therefore, the question in this case is in reality precisely the same with reference to both the statutes. The 49 *Geo.* 3, c. 126, however, provides, in section 10, that nothing in it contained shall extend or be construed to extend to prevent or make void any deputation to any office in any case in which it is lawful to appoint a deputy, or any agreement, contract, bond or assurance lawfully made in respect of any allowance, salary or payment made, or agreed to be made by or to such principal or deputy respectively, *out of the fees or profits of such office*. Now the condition of this bond recites an agreement to pay the plaintiff a fixed sum of 450*l.* a year, *out of the fees and emoluments of the office*, an agreement which is perfectly lawful under both the acts of parliament. The defendants were not liable to pay, nor could the plaintiff recover, unless the fees amounted to 450*l.* a year; and the case finds that they exceeded that sum. The jury, indeed, found that the money was to be paid absolutely and at all events; but that was a finding in

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(a) 2 Salk. 466.

(b) Ibid. 411.



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contradiction of the bond, and must be rejected accordingly. Lastly, the case finds that the plaintiff was appointed to hold and exercise the office by himself or *his sufficient deputy*, which is decisive to shew that the transaction is not within the mischief intended to be remedied by the legislature.

*G. R. Cross, contra.* The bond is clearly void. The office was one in the gift of the crown, and the sale of the deputation was rendered illegal by the reservation of a sum certain to be paid absolutely and at all events. [Lord *Tenterden*, C. J. The short question seems to me to be, whether the finding of the jury upon that subject is to be received or rejected; whether it is so totally inconsistent with the bond that we are bound to reject it.] That is the question, and the answer to it is that the fact cannot be rejected, and for two reasons: first, that taking the recital and the condition together, and looking at the bond as a whole, it is apparent upon the face of it that the money was intended to be secured payable at all events, and, therefore, that the finding was not inconsistent with the bond; and secondly, that even if the finding is inconsistent with the bond, still it was competent for the defendants to state upon their plea, and to prove by their evidence, the real nature of the transaction for the purpose of avoiding the bond. *Collins v. Blantern* (a), *Paxton v. Popham* (b). [Here the Court stopped him.]

LORD TENTERDEN, C. J.—Looking at the bond itself there is strong ground for contending, and the belief of my mind is, that the parties intended that the money should be secured so as to be payable absolutely and at all events; for the payment was to be made before the amount of the fees could possibly be ascertained. But, upon the authority of the cases last cited, it was clearly competent for the jury to

(a) 2 Wils. 347.

(b) 9 East, 408.

find the fact which rendered the transaction illegal. They have found it, and that fact appearing, the bond is clearly void, and the defendants are entitled to the judgment of the Court.

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BAYLEY, J.—This case is one of the exceptions to the general rule of evidence, that parol evidence cannot be admitted to contradict or vary a written document. The bond is apparently legal, but when it is suggested that the bond itself is colourable only, and that the real agreement between the parties was illegal, facts are clearly admissible to shew what the real transaction was. It is so in cases of usurious contracts, and it is so in the present case. Then taking the fact here found into consideration, there can be no doubt that the bond is void.

LITTTLEDALE, J.—I think there is quite enough upon the face of the bond to shew that it is void, without taking into consideration the finding of the jury. The money is made payable at dates when the amount of the fees could not be known, which of itself proves the intention that the money should be paid at all events. However, the evidence was clearly admissible; and the finding of the jury was perfectly conclusive to shew that the bond is void.

PARKE, J.—I am of the same opinion. The terms of the condition are that the money shall be paid absolutely: not that they shall be paid out of the fees.

Judgment for the defendants (a).

(a) And see Co. Litt. 234 a.; Com. Dig. Officer, K.



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## BURCH v. The Earl of LIVERPOOL.

An agreement to hire a carriage for more than one year, determinable at any time upon payment of a year's hire, is an agreement not to be performed within one year from the making thereof, and must be signed by the party to be charged therewith.

**ASSUMPSIT.** The declaration stated, that in the lifetime of *Catherine, Countess of Liverpool*, by an agreement made 30th June, 1825, between the countess and plaintiff, it was agreed that the countess should hire of plaintiff, and that plaintiff should let to hire to the countess, a carriage, for the term of five years next ensuing, and that the countess should pay to plaintiff every year during the term, for the use of the carriage, ninety guineas; that plaintiff delivered the carriage to the countess, and that the countess received the same from plaintiff, in pursuance of the agreement; that the countess made her will, thereby appointing defendant her executor, and died in October, 1827; that defendant proved the will, and took upon himself the execution thereof, and thereby and by means of the premises became liable to and bound by the agreement for the remainder of the term; that being so liable, in consideration that plaintiff would suffer the agreement to be put an end to, defendant promised to pay him ninety guineas; and that plaintiff did suffer the agreement to be put an end to, but defendant had not paid the money. Plea, non assumpsit, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after last term, the case was this:—On the 30th of June, 1825, the Countess of *Liverpool*, who had had previous dealings with the plaintiff, hired of him a carriage for five years, at ninety guineas a year, paying one year's hire in advance, which she continued to do till she died in September, 1827. In the following month the defendant called upon the plaintiff, informed him of that event, and inquired what was generally done under such circumstances. The plaintiff stated, that the custom of the trade was, and it was proved to be so at the trial, to pay one year's hire as a consideration for putting an end to the agreement before the time expired. The defendant replied, that he understood such was the custom; that he was leaving London for a few days, but would

previously send the carriage home, and that upon his return he would either write or send to the plaintiff, and settle the matter. The carriage was sent home on the 17th of October, 1827, but no further notice of the matter was ever taken by the defendant, and at length the present action was brought. It was contended on the part of the defendant, that there was no proof of any promise by him personally to pay the amount of the year's hire, and that, even if there had been, there was no consideration whereon to found such a promise, because there was no proof of any written agreement having been executed by the Countess of *Liverpool*, which there ought to have been, pursuant to the provisions of the fourth section of the Statute of Frauds, 29 Car. 2, c. 3, the agreement proved being one which was "not to be performed within the space of one year from the making thereof." It was insisted *contrà* for the plaintiff, that the agreement must be considered as having been entered into with reference to the custom proved, in which case the agreement would be determinable at any time and might be performed within a year, and no note in writing would be necessary. The Lord Chief Justice was of opinion that the agreement made between the Countess of *Liverpool* and the plaintiff was, by the express terms of it, an agreement not to be performed within the space of one year from the making thereof, and that, therefore, not having been signed by the countess, it would not have been binding upon her, and consequently formed no consideration for any promise made by the defendant personally to pay the money. His lordship, therefore, directed a non-suit, but gave the plaintiff leave to move to enter a verdict in his favour for ninety guineas.

*F. Pollock* now moved accordingly. The agreement proved must be construed with reference to the custom of the trade, and so construed, it was an agreement for five years, determinable at any time either by the countess or her legal representative upon payment of one year's hire.

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Then it was an agreement which might be performed within one year from the making of it, and did not require to be in writing and signed by the countess. If the countess had died within the first year of the term, her executor might clearly have put an end to the agreement; and an agreement which might have been, although in fact it has not been performed within a year from the making of it, is not within the provision of the statute (*a*). [*Bayley, J.* There the defendant would be liable only in his representative character as executor; here he is sued in his personal character, as upon a promise made by himself.]

Lord TENTERDEN, C. J.—It is evident, from the express language of the agreement, that it was an agreement *not* to be performed within the space of one year from the making thereof, but, on the contrary, that it was to continue for a term of five years. It was, therefore, within the statute, and ought to have been signed by the party to be charged therewith (*b*).

(*a*) The statute extends to all contracts which are not to be carried into full, effective, and complete execution, within the space of one year from the making thereof. The word “performed” does not signify an inchoate performance, or part execution of the agreement; and the provisions of the statute render a parol contract void, if it appear to have been the express understanding of the parties at the time, that it was not to be completed within a year; though it might be, and was in fact, in part performed within that period. *Chitty, jun. on Contracts*, 209. But contracts which may or may not happen to be performed within a year, have been held not to be within the statute. Thus an agreement to leave money by will need

not be in writing, though uncertain as to the time of performance. *Fenton v. Emblers*, 3 Burr. 1278; 1 W. Bla. 353. So a parol promise to be performed on a contingency, as to pay so much money on the return of such a ship, is not within the statute, though the ship do not arrive within a year. *Anonymous*, 1 Salk. 280. And see *Peter v. Compton*, Skinner, 353; *Smith v. Westall*, 1 Ld. Raym. 316; Selw. N. P. 839, 7th edit.; *Chitty's Statutes*, 372, n.

(*b*) “Where the agreement is to be performed upon a contingency, and it does not appear on the face of the agreement that it is to be performed after the year, there a note in writing is not necessary, for the contingency might happen within the year; but where it ap-

BAYLEY, J.—Even if the custom proved, which I cannot help considering as a very extraordinary one, could be regarded as forming part of the contract, still the contract was, in its express terms, a contract for five years, determinable by the parties within that period. It was in its very language a contract agreed not to be performed within a year, and therefore within the Statute of Frauds (*a*).

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The other Judges concurred.

Rule refused (*b*).

*appears from the whole tenor of the agreement that it is to be performed after the year, then a note in writing is necessary.*" By a majority of the Judges in *Peter v. Compton, Skinner*, 353.

(*a*) "The Statute of Frauds plainly means an agreement not to be performed within the space of

a year, and expressly and specifically so agreed." By *Denison, J.*, 3 Burr. 1281; in *Fenton v. Emblers*, 3 Burr. 1278; 1 W. Bla. 353.

(*b*) And see *Boydell v. Drummond*, 2 Campb. 160, 11 East, 142; *Gilbert v. Sykes*, 16 East, 150, 154; *Williams v. Jones*, 7 D. & R. 549, 5 B. & C. 108.

#### SWEETING v. HALSE.

THE plaintiff in this case having obtained a rule absolute for a new trial (*c*), subsequently obtained a rule to shew cause why he should not be at liberty to amend his declaration, upon payment of costs, by adding counts upon the second contract, which had been improperly submitted to the jury on the first trial.

*Campbell* and *Barstow* shewed cause. If the Court allow the proposed amendment, they will go farther than has ever yet been gone according to any precedent. This is the case of a plaintiff, who having declared upon a parti-

(*c*) *Ante*, 287. The plaintiff was the drawer, and the defendant the acceptor, of a bill of exchange. Before the bill became due, the defendant's name was erased, and a new contract between the plain-

tiff and the defendant was indorsed upon the bill, but was not stamped. The declaration contained no count upon this new contract, and the object of the present rule was to supply that defect.

Where, in an action upon a bill of exchange, it appeared that the bill had been cancelled, and a new one substituted, which was not declared upon, and the defendant thereupon had a verdict, the Court refused to allow the plaintiff to amend upon payment of costs, by adding counts upon the new bill.

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cular contract, gone to trial, and failed, but afterwards obtained a new trial, now seeks to engraft upon his original action an entirely new cause of action, founded upon an entirely new contract. No case can be found authorising such an amendment as this. The case which has gone the farthest upon the subject is that of *Atkinson v. Bell* (a). There the plaintiffs, who declared for goods bargained and sold, and for work, labour and materials, being, from the peculiar circumstances of the case, unable to support either of those counts, were permitted, upon payment of costs, to amend their declaration by adding counts for not accepting the goods, and to go to a new trial; *Bayley, J.*, observing, however, (b) "that the permission to amend was granted solely on account of the hardship of the case, and must not be drawn into a precedent." But even if that case could be drawn into a precedent, it does not go the length which would be requisite to support the present application. In that case there was only one contract, and the difficulty under which the plaintiffs laboured was, that they had not so described the contract in the declaration as to let in evidence of what the contract really was; upon the contract, as it really existed between the parties, it was not doubted that the plaintiffs were entitled to recover. Here the case is essentially different. There have been two distinct contracts entered into between these parties. The plaintiff made his election to proceed upon one of them; but he failed, because it appeared that that contract had been rescinded, and a new contract, with different terms, entered into. The contract upon which this plaintiff sued would not entitle him to a verdict, whatever might be the form of his declaration. Then his action having failed upon the first contract, he seeks to amend his declaration for the purpose of prosecuting the same action upon the second contract. But this he cannot be allowed to do; he must bring a fresh action. The answer so frequently given to motions for setting aside nonsuits, may most pro-

(a) 2 M. & R. 292; 8 B. & C. 277.

(b) 3 M. & R. 302.

perly be given to the present plaintiff, "You are not concluded—you may bring a fresh action." The plaintiff here is not concluded; because, although in point of form there is a verdict against him, the judgment on that verdict will be no bar to a fresh action, if that be founded upon a different contract. If this amendment be allowed, the defendant may be burthened with the earlier costs of the cause; because he may be without an answer to the new counts, and may have defended the action solely upon the strength of the former objection.

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Sir *J. Scarlett* and *Chitty*, contra. Even if there were no precedent for this application, the Court, in the exercise of that discretion which regulates all motions to amend, would allow the amendment prayed. The objection taken at the trial was against the merits of the case; and the opposition to this motion is equally so. The proposed amendment cannot in any way prejudice the defendant; his defence, if he have any, will be equally available, whether it be offered to the new counts, if allowed in this action, or to similar counts in another action. But this application is not without precedent. The Court are in the constant habit of allowing declarations in ejectment to be amended, by adding counts upon new demises, on such terms as they think reasonable. In those cases a new action is, in point of substance, as well as of form, engrafted upon the old; and it frequently happens that the lessor of the plaintiff recovers upon the demise which he has been allowed to add upon payment of costs. The circumstance of the cause being so far advanced does not affect the principle; the only difference it produces is in the amount of costs which the plaintiff has to pay. The case of *Atkinson v. Bell* shews that the advanced stage of the cause is not an insuperable objection to the allowance of an amendment, if the Court think that the justice of the case calls for it. The best test to try whether the justice of the case calls for it here, is to see whether the defendant will consent to suffer judgment by



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default upon the new counts, upon the plaintiff undertaking to pay all the costs of this cause. [This proposal was not accepted.] The refusal to accept this proposal shews, that the defendant cannot be prejudiced by the amendment, and that he has, or conceives that he has, a defence to the new counts. It follows, that he cannot be supposed to have defended this action solely upon the strength of the former objection.

Lord TENTERDEN, C. J.—I think if we were to make this rule absolute, we should be going further than the Courts have ever gone hitherto in cases of this description. There will be no end to applications of this nature, if they are once yielded to. The safer course, and that which will compel parties to pay some attention to their own cases, will, in my opinion, be, to refuse to assist them in so advanced a stage of the cause. The plaintiff must be left to his remedy by a new action. I am sorry for it; because the objection to the amendment is against the merits of the case.

The other Judges concurred.

Rule discharged.

GEORGE BARKER, one of the Executors of MATTHEW BOWLES, deceased, v. CHARLES MAY, and MARY his Wife.

Money arising from the sale of lands devised to executors in trust to sell for the payment of legacies, constitutes equitable, and not legal, assets; and cannot be sued for in the Ecclesiastical Court.

THIS was a rule for a prohibition, obtained upon affidavits disclosing the following facts:—

The testator, *M. Bowles*, by his will appointed *S. Bowles* and *G. Barker* his executors, and devised to them, their heirs and assigns, all his lands, tenements, hereditaments, &c., in trust to sell and dispose of the same, and directed that the money which should arise from the sale, as well as

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the rents and profits until the sale, should be deemed to be part of his personal estate; and that such money, rents and profits should be subject to the dispositions thereafter mentioned concerning his personal estate. He then directed his personal estate to be sold; and when the money arising from the sale of his personal estate, and from the lands, &c. thereinbefore made saleable, and the rents and profits thereof, should have been collected, he disposed of the same in the manner therein mentioned. He bequeathed several legacies, and, among others, one to *M. May*, the wife of *C. May*. The will was proved in 1815. In 1828 a citation issued out of the Consistorial Court of Norwich, at the suit of *May* and his wife, whereby *Barker*, as one of the executors of *M. Bowles*, was required to produce an inventory and account of the goods and chattels, &c., which had come to his possession as executor of *M. Bowles*. *Barker* accounted for all the personal estate, and admitted that he had in his hands the sum of 159*l.* 16*s.*, arising from the sale of the real estate; but insisted that he was not liable to account for the same, it not being part of the personal estate of *M. Bowles*. *May* and his wife then presented, for admission, to the Judge of the Court, a libel, for the purpose of enforcing payment of their legacy; and the Judge admitted the libel. The present rule was then moved for, on the ground that the devise being of real estate, the Consistorial Court had not jurisdiction to entertain the suit; and that a devise of real estate, although to executors for sale, was a trust, and the proceeds of the sale equitable, and not legal, assets.

*Tindal*, S. G., now shewed cause. The Consistorial Court has jurisdiction to entertain this suit. The testator has expressly directed that the proceeds of his real estate, when sold, shall be deemed part of his personal estate; the executor, by inserting the proceeds of the real estate in his inventory and account, has admitted that they are part of the personal estate: and the real estate having been sold,

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and the money realized by the executor, that money has become, in point of law, personalty. Prohibition, therefore, will not lie in this case; *Anonymous* case in *Dyer* (a). There, "a man devised lands to his executors to be sold, directing that the money arising therefrom should be disposed of in legacies specially expressed in his will. One of the legatees, after probate of the will, sued in the Court Christian for his legacy; and the question was, whether prohibition would lie in such case. And *Cutline*, *Dyer*, and *Saunders* thought that it would not lie, because the money was assets in the hands of the executor, and there was no remedy for the legacy in the temporal court." In *Love v. Naplesden* (b), it was held that a legacy bequeathed out of the profits of freehold and leasehold lands might be sued for in the Spiritual Court, although the term expired, and the devisee of the freehold died before payment. "They brought prohibition, surmising that this legacy being out of the profits of land, no suit could be in the Ecclesiastical Court for it. But in regard it was a mere personal legacy, although to be raised out of the profits of land, yet being raised out of the lease for years as well as out of the land, and he (the executor) having raised it, and being dead without payment, there being no action maintainable for it at the common law by account against his executors or otherwise; it is therefore reason she (the legatee) should have her remedy in the Spiritual Court: whereupon a consultation was awarded." In *Netter v. Brett* (c) *Croke*, J., who differed from the rest of the Court, said, "I assented to the case in 9 *Eliz.* (*Dyer*, 264), upon this reason, because the land being sold, the money is personal, and assets in the hands of the executor, so as it savours not of the realty, being executed." In *Bassett v. Bassett* (d), a legacy was charged upon a fund partly real and partly personal, payable at twenty-one or marriage. The legatee died before twenty-one, and unmarried. Assets were admitted. The personal represen-

(a) *Dyer*, 264, (41).

(b) *Cro. Jac.* 279.

(c) *Cro. Car.* 397.

(d) 3 *Atk.* 208.

tative of the legatee having sued in the Spiritual Court for the legacy, the Lord Chancellor refused an injunction to stay the proceedings, being of opinion that the legacy was charged upon personal estate, and was within the jurisdiction of the Spiritual Court.

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*Hutchinson*, contra. The Spiritual Court has clearly no jurisdiction over this case. At the close of the report of the Anonymous case cited from *Dyer* (a), it is said, "But *Bendlows* said it had been held otherwise before this in one case," and *Paschall v. Ketterich* (b) is referred to, which is this:—"Note, by the opinion of all the justices of each bench, that where a man devised by his last will and testament in writing, that his executors should sell his lands, and that his daughter should have a portion of the money for her advancement, and so with respect to others a sum certain, and died, and his executors made sale, and would not pay the legacies, whereupon the daughter sued them in the Court Christian; prohibition well lies in that case, because it is not a legacy testamentary, but out of lands." And in a note to that case it is added, "This book was affirmed by *Coke*, arguendo, to be the better law, and that he shall sue in the Court of the King for the money; and so it was adjudged two or three times in the course of his practice by *Coke*." *Sambern v. Sambern* (c) seems to be one of the cases there alluded to, and is in point. In *Edwards v. Graves* (d) the devise was to trustees to sell land, and to divide the money between the defendant and three others equally. The trustees sold the land, but did not pay over the money, and the defendant sued in the Spiritual Court for his fourth share. It was held by this Court that the money was not testamentary, for it was not assets to

(a) *Dyer*, 264, (41).

(b) *Ibid.* 151, (5).

(c) 2 Bulstr. 257. And in *Lore v. Naplesden*, it is said, "a consultation was awarded by all the

justices besides *Williams*, who doubted thereof. Vide *Dyer*, 151, and 9 *Eliz.* 264."

(d) *Hobart*, 265.

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pay debts, but a sum arising out of land, appointed to special uses in way of *equity*, and not as a legacy, and, therefore, was not to be sued for in the Ecclesiastical Court, but in a Court of Equity; and that Court cannot hold plea of a legacy in equity, but where it is a legacy in law indeed; for they must hold plea by their law, as our courts of law do. In *Bastard v. Stockwell* (a) it was held that none can sue in the Ecclesiastical Court for a legacy arising out of land, because not within their conusance. And these cases are consistent with the rule of law as laid down in *Bacon's Abridgement* (b) and in *Shepherd's Touchstone* (c), in the latter of which it is said, "If one devise that his executors shall sell the land, and, with the money coming or made of it, shall pay such and such legacies or sums of money in particular, to such and such persons by name; this is not a legacy for which a suit lieth in a Court Christian; but for this every one that is to have a portion may have account against the executors after the sale." And Dyer, 151, is referred to. In *Lewin v. Okeley* (d) Lord Hardwicke decided that wherever an executor is also a trustee for payment of debts, the assets shall still be equitable, and not legal. *Newton v. Bennett* (e) is to the same effect. In *Silk v. Prime* (f) Lord Camden reviewed all the authorities upon the subject, and decided, that wherever the land is devised for the payment of debts to the same persons that are made executors, the assets are equitable, and his decision was confirmed and acted upon by Lord Eldon in *Bailey v. Ekins* (g) and *Shiphard v. Lutwidge* (h).

Lord TENTERDEN, C. J.—I am of opinion that this rule for a prohibition must be made absolute. It certainly has been held in some of the older cases, that where land is devised to be sold by executors, or devised to executors

(a) 2 Shower, 50.

(b) Legacy, (M).

(c) Cap. 23; p. 431, 5th ed.

(d) 2 Atk. 50.

(e) 1 Bro. C. C. 134.

(f) Ibid. 138, in notes.

(g) 7 Vesey, 319.

(h) 8 Vesey, 26.

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to be sold, the proceeds of the sale are legal assets. But later cases have established that if land be devised to trustees to be sold for payment of debts; that the same persons are made executors, the effect of that is to create a charge upon the land to the amount of the debts; that there the proceeds of the land, when sold, are equitable, and not legal, assets in the hands of the executors; and, therefore, that a legatee entitled to a portion of those assets cannot sue for it in the Ecclesiastical Court. There is one very modern and very decisive case upon the subject, I mean that of *Clay v. Willis* (a), in this Court. There land was devised to trustees, who were also appointed executors, in trust to sell, and to pay debts, and discharge incumbrances. It was held that the money arising from the sale was equitable, and not legal, assets. *Bayley*, J. there said, "Was the money legal, or was it equitable assets? I think it was clearly equitable, and upon two clear principles; first, that the subject-matter of the devise was equitable property at the time of the testator's death; and secondly, that the devise was in trust to pay debts. With respect to the first, it was held in Sir *Charles Cox's* case (b) and in *Hartwell v. Chitters* (c), that the equity of redemption of a term was equitable assets, and so, therefore, is the equity of redemption in this case. With reference to the second, there are a great many cases directly in point. There is the early case of *Lewin v. Okeley*, then *Silk v. Prime*, where all the former cases were fully considered, and *Newton v. Bennett*; all which have been recently reviewed and recognized as law by the present Lord Chancellor (d), in *Bailey v. Ekins*, and *Shiphard v. Lutwidge*. Some of the old cases alluded to in argument have certainly decided that the proceeds of lands devised to trustees for the payment of debts, they being also made executors, are legal assets; but all the more recent authorities are decidedly the other way." (e) And *Holroyd*, J. said, "Whatever may

(a) 2 D. & R. 539; 1 B. & C. 364.

(b) 3 P. Wms. 341.

(c) Ambler, 308.

(d) Lord Eldon.

(e) 2 D. & R. 546.

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have been decided in former cases, some of which are in *Vernon*, it has been since completely settled that a devise to trustees (who are also made executors of the will), in trust to sell for the payment of debts, &c. does not convert the proceeds into legal, but renders them equitable, assets. This is established by the cases which have been alluded to in argument; *Newton v. Bennett*, *Silk v. Prime*, *Lewin v. Okeley*, *Barton v. Boucher* and *Batson v. Lindegren* (*a*). It is fully established, therefore, that in such a case as the present the assets are equitable, and not legal" (*b*). Now that case, in principle, is not distinguishable from the present. But, even without that additional authority, I should have been decidedly of opinion that the principles laid down in the other cases which have been cited, furnish a plain and intelligible rule, that where lands are devised to executors to be sold for the payment of debts and legacies, the money arising from the sale is to be deemed equitable, and not legal, assets. In this case the executors are trustees of the money arising from the sale of the land; that money, therefore, constitutes equitable, and not legal, assets, and cannot be sued for in the Ecclesiastical Court. As to the language of the will, it is only necessary to observe that the testator could not vary the legal character of the property, by directing that it should be deemed part of his personal estate.

BAYLEY, J. concurred.

LITTLEDALE, J.—I am of the same opinion. The proper remedy for this legatee is in a Court of Equity.

PARKE, J. concurred.

Rule absolute for a Prohibition.

(*a*) 2 Bro. C. C. 94.

(*b*) 2 D. & R. 548.



TUCK v. TOOKE and WRIGHT, in Error.

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*TOOKE* and *Wright* sued *Tuck* in the Common Pleas, in debt on bond conditioned for the payment of 1000*l.* to the obligees, in trust for *Mary Juler*. Plea: that after the bond had become absolute, the obligor became bankrupt, stating the necessary facts to support the commission, and alleging surrender and conformity; that after he had passed his last examination, a meeting of divers of the creditors was called, upon due notice, to the intent that such creditors should decide upon a certain offer of composition, and security for such composition; that the obligor and *William Fox Juler* offered to the creditors assembled, and all others, a composition and security for the same, to wit, six shillings in the pound; which the creditors then present agreed to take; that a further meeting of creditors took place on the 20th of June, 1826, after due notice, when the composition and security were again accepted by all the creditors present; whereof the obligees afterwards had notice; whereupon the commission was superseded. Averment of readiness, and tender of the composition and security. Replication: that the plaintiffs were not, nor was either of them, present at the meetings, or either of them, and had not, at the time when these meetings or either of them were held, proved any debt under the commission, or ever accepted, or agreed to accept, such offer of composition and security. Rejoinder: that the plaintiffs did accept such offer of composition and security; and issue thereon.

Sixth plea: that before the execution of the bond, *Tuck* became indebted to *Mary Juler* and to other persons, and

lease, and that the plaintiff *afterwards* obtained and accepted the bond in suit for the residue of the plaintiff's debt, by fraud and covin, without the knowledge or consent, and in fraud of the other creditors, is tantamount to an allegation, not of fraud and covin generally, but of fraud and covin effected by the particular means described in the inducement; and as the facts stated do not shew any stipulation for the giving of the bond contemporaneous with the agreement for the composition, the plaintiff is entitled to judgment non obstante veredicto, after an issue upon the fraud and covin found in favour of the defendant.

Where a commission of bankrupt issues, under which nine tenths of the creditors assembled at two meetings, called in pursuance of 6 Geo. 4, cap. 16, sect. 133, agree to accept a composition, whereupon the commission is superseded, a creditor, not present at the meetings, and not acceding to the composition, or proving his debt under the commission, is not barred of his action.

A plea, stating that the plaintiff, and the defendant's other creditors, agreed to accept a composition and release their debts, that several creditors, relying upon the agreement, executed a re-



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was unable to pay; that in consideration that certain friends of *Tuck* had agreed to furnish the means of paying a composition, it was agreed between *Tuck*, *Mary Juler*, and the other creditors, that she and they would accept a composition and execute a release; and that divers creditors, confiding in this agreement, accepted the composition, and released *Tuck*; whereof *Mary Juler* afterwards had notice. Averment, that the bond was obtained by fraud and covin, *that is to say*, that the plaintiffs, at the request of *Mary Juler*, obtained the same of *Tuck*, to secure to them, in trust as aforesaid, the residue of the said debt, with interest, and deducting the amount of the composition, without the knowledge, and in fraud, of the other creditors. Replication: that the bond was obtained fairly and honestly, and not by fraud or covin. At the trial before *Best*, C. J., the jury found all the issues for the obligees, except that on the replication to the sixth plea; in respect of which the verdict was, that the bond was not obtained fairly and honestly, but by fraud and covin, *modo et formâ*. Upon argument, the Court of Common Pleas gave judgment for the obligees on that issue, *non obstante veredicto*; and a general judgment having been entered for them, a writ of error was brought, returnable in this Court. Errors being assigned, the same were now argued by

*Kelly*, for the plaintiff in error. The matters of the sixth plea amount to a fraud in law. But supposing they are not sufficient to constitute a fraud in law, the particular facts may be rejected, because the material allegation in the plea is, that the bond was given in fraud of the creditors. The substance of the original agreement was, that the creditors were to receive a composition and release the defendant. Many creditors received their composition, and executed the release. The defendant goes to the plaintiff, without the knowledge of the creditors, pays the composition, and gives a bond for the residue. These facts constitute a fraud in law. Upon the original composition, any security, preference, or advantage, would be a violation of

the agreement upon which the release of the creditor proceeded. One of the earliest cases on the subject is, *The Earl of Chesterfield v. Jansen* (a); in which it was said, that where a debtor enters into an agreement with a particular creditor for a composition of 10s. 6d. in the pound, provided the rest of the creditors agree, and this creditor, at the same time, makes a private clandestine agreement for his whole debt, though it be no particular fraud to the debtor, yet, as it is a fraud on the creditors in general, who entered into the agreement on a supposition that the composition would be equal to them all, the Court has relieved. But in *Cockshott v. Bennett* (b), it was said that in such a case there was no difference between law and equity. In that case the note given for the balance of the debt preceded the execution of the composition deed. Here *Mary Juler* does not execute the deed at all; and at the time she obtained this further security from the defendant, she retained all her powers, except so far as she was bound by the agreement. In *Wood v. Roberts* (c) it was held, that if one creditor, by undertaking to discharge his debtor, induce another creditor to discharge that debtor on receiving a composition for his debt, he cannot afterwards recover from that debtor. Here the other creditors were induced to enter into the composition. This is mentioned, because it was said elsewhere that it was not a fraud upon all the creditors. If, however, any one of the creditors was defrauded, the transaction is void, *Leicester v. Rose* (d). These cases must not turn upon nice distinctions. The only question is, whether fraud has been committed on one or more creditors. In that case Lord *Ellenborough* says, "from the first mention of the case to the present moment, I have never entertained a particle of doubt upon it. The question is, whether any legal effect can be given to an agreement by which these creditors, the plaintiffs, are to

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(a) 1 Atk. 301.

(c) 2 Stark. N. P. C. 417.

(b) 2 T. R. 763.

(d) 4 East, 372, and 1 Smith, 41.

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have a better security for the same sum than the rest of the creditors, after having entered into an agreement with them, importing that the same satisfaction was to be made to all by the same mode of payment." Here the plaintiffs entered into an agreement with all the other creditors. The object of the original agreement was to prevent the debtor from entering into secret arrangements with particular creditors. Stress has been laid elsewhere on the fact of the bond's being given nearly two years after the agreement. This circumstance, however, appears to be utterly immaterial upon any question as to the sufficiency of the plea. It might have been matter to be considered by the judge and jury, and if it was material, it was no doubt so left to the jury. But after verdict it is quite immaterial. The time is laid under a *videlicet*; and the allegation in the plea would have been supported by evidence shewing that the bond had been given one moment after the agreement. If it was a necessary circumstance to make the deed fraudulent, that the composition should have been tendered, the Court will now presume that it was tendered. After this finding, all facts necessary to constitute fraud will be presumed. The special facts are merely stated as matter of inducement, and are not traversable. The substance of the issue was, whether the bond was obtained by fraud and covin. In *Hill v. Montague* (a), a general plea of usury was held ill on special demurrer; but Lord *Ellenborough* said, "usury is not like fraud and covin, which usually consist of a multiplicity of circumstances, and therefore it might be inconvenient to require them to be particularly set out." There are many cases in which pleas in the most general terms are allowed. It is said that, in this plea, the facts alleged are the only fraud relied on, without saying what the effects would have been if the plea had concluded, "and so the said deed is void." The special facts are here introduced merely for the purpose of giving a further character to the fraud. They shew that this was a fraud upon creditors.

(a) 2 M. & S. 377.

[Lord *Tenterden*, C. J. The words "as aforesaid and not otherwise howsoever," mean, by the fraud and covin mentioned in the plea.] That means by a fraud upon creditors. [Lord *Tenterden*, C. J. Without the inducement the plea would not be good.] In a note to *Hancock v. Prowd*(a), it is said that these words, "that defendant defers procuring acknowledgment of satisfaction with the intention to defraud are the material part of the replication. And it seems the payment of the money in satisfaction is only inducement, and not traversable. And the defendant is bound to traverse the fraud." [Bayley, J. The fact of the payment of money in satisfaction was admitted.] The case from Sir *William Jones*, there cited, is stronger (b). By 6 *Geo.* 4, c. 16, s. 133, nine-tenths in number and value of creditors may accept a composition which shall bind the rest. Though there are no express words to extinguish the original debt, yet, as the statute refers to the bankrupt's having passed his last examination, he would have done all that was necessary to entitle him to a certificate.

*Campbell*, contra, was stopped by the Court.

LORD TENTERDEN, C. J.—All that the statute enacts is, that if, at any meeting of creditors, after the bankrupt shall have passed his last examination, the bankrupt, or his friends, shall make an offer of composition, or security for such composition, which nine tenths, in number, and value, assembled at such meeting shall agree to accept, another meeting for the purpose of deciding upon such offer shall be ap-

(a) 1 Wms. Saund. 334, (g).

(b) In *Veale v. Gatesdon*, W. Jones, 92, 5 Resolution, it was resolved, that although the plaintiff in his replication has alleged a particular composition and satisfaction, by payment of 20*l.*, yet that is not traversable, but, "that, notwithstanding the said composition, the

judgment was kept on foot by covin;" for every creditor cannot have knowledge of the agreement in particular. Therefore it would be hard that the plaintiff should be bound by a traverse thereof. And the allegation thereof is but inducement, which is not traversable.

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pointed. And if at such second meeting nine-tenths in number and value of the creditors then present shall also agree to accept such offer, the Lord Chancellor shall and may, upon such acceptance being testified by them in writing, supersede the said commission. This brings it to the first point. I agree to the proposition that we are not to make nice and subtle propositions. If one creditor manifest to another creditor that he means to concur in the composition and at the same time bargains with the debtor for some further advantage, all that is done upon it is void. In this case I do not see any secret or private bargain made by the plaintiff or by any person on his behalf. Upon the plea the bond in question appears to be totally distinct, arising after the agreement. The principle of the former decisions does not warrant our holding this bond to be void. It is further said, that the issue is taken upon the general allegation, and that we ought to reject the introductory matter and take only the allegation of fraud and covin. This is not reasonable. In this way a defendant might allege in his plea, that the instrument was void for one cause, and prove that it was void for another. He was bound to set forth matter in fact, upon which the Court would adjudge whether it amounted to a defence in point of law. He might also put on the record a general allegation that the bond was void in law. The plea ought to shew what the fraud is. If the plaintiff had known that the defendant was entering into a general composition with his creditors, and before she had bound herself she had taken advantage of the defendant's situation, the case would have been very different. The plea is vicious throughout. It does not state that the plaintiff knew that the defendant was compounding with his other creditors, or that the others knew that the defendant was compounding with the plaintiff. The allegation in the plea would be true, if each creditor negotiated separately. It does not appear that the plaintiff had an opportunity of receiving the composition. The plea does not shew any pressure, or that the bond was obtained at her instance. It may have been

given perfectly voluntarily, and because the defendant thought the plaintiff's a hard case, though he was released from any legal obligation. What is stated as fraud does not amount to fraud.


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BAYLEY, J.—The facts stated do not amount to fraud on the creditors. It must be intended that the bond was given subsequently to the agreement. If it had been given shortly after, it might have gone to the jury as part of the agreement. You may plead fraud and covin generally; but here the particular fraud is pointed out by the plea.

LITLEDALE, J.—The allegation as to the time at which the bond was given is not material; but unless it was part of the agreement that such bond should be given, no fraud was committed. Here it must be taken that the bond was given after the agreement, and as it is not alleged that it was part of the agreement that the bond should be given, the plea contains no allegation of that which amounts to fraud.

PARKE, J.—The defendant here was bound by the particular fraud on which he had chosen to rely. It does not appear by the plea, that the bond was not wholly unconnected with the agreement. With respect to the question under the last Bankrupt Act, it does not appear that *Mary Juler* had proved under the commission, or was present at any of the meetings mentioned in the fourth plea; but if by the 133d section any persons can be bound who are not present, they must at least have proved under the commission.

Judgment affirmed.



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## The KING v. TIZZARD.

The common clerk of a borough is appointed by the mayor, aldermen, and bailiffs, removable at their pleasure, and with a salary variable at their pleasure; and it is his duty to attend the corporate meetings and take minutes of the proceedings. The office of such common clerk and that of alderman are incompatible; and the acceptance of the former vacates the latter.

**INFORMATION**, in the nature of a quo warranto, for usurping the office of alderman of the borough of Weymouth. **Plea:** that King *Geo. 3.* by charter, bearing date, &c. granted that in the borough there should be one mayor, an indefinite number of aldermen, two bailiffs, and twenty-four chief burgesses, and that every person having served the office of mayor should become an alderman for life; and that defendant, in 1804, was duly appointed to, and served the office of, mayor, and so became an alderman. **Replication:** that by the said charter it was granted that the mayor, aldermen, bailiffs, and chief burgesses might make bye-laws; and that they should have a recorder; and that the mayor, recorder, and bailiffs, or any two or more of them, of whom the mayor or recorder should be one, should hold sessions; and, further, that the mayor, aldermen, bailiffs, burgesses, and commonalty, should have, within the borough, one discreet and fit man, who should be, and be named, the common clerk of the borough, to continue in the same office during the pleasure of the mayor, aldermen, and bailiffs; that afterwards, and after defendant became an alderman, the office of common clerk became vacant, and defendant so being an alderman, was, by the then mayor, aldermen, and bailiffs, nominated, elected, and appointed, for the common clerk of the borough, to continue in the same during the pleasure of the mayor, aldermen, and bailiffs; that defendant took the oaths, and became and was common clerk; wherefore, &c. There were two other replications substantially the same, and a fourth, which, after stating the appointment of defendant to the office of common clerk, and his acceptance of that office, alleged, that at the time when defendant was so elected, and took upon himself the said office, a yearly salary of 10*l.* was payable and paid by the mayor, aldermen, bailiffs, burgesses, and commonalty, to the common clerk for the time being, subject to be in-

creased, diminished, or withdrawn altogether, by the mayor, aldermen and bailiffs, at their pleasure; and that the offices of alderman and common clerk being, by reason of the premises, incompatible with each other, defendant thereby then and there resigned and vacated his office of alderman. The fifth replication alleged, that it was the duty of the common clerk to attend and be present, as such common clerk, at all corporate meetings of the mayor, aldermen, bailiffs, burgesses, and commonalty, and under their inspection and direction, to draw up in their books minutes and entries of their resolutions and proceedings; and then averred, as before, that the offices were incompatible, &c. Demurrer to the replications, and joinder in demurrer.

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*Follett*, in support of the demurrer. The relator in his replications suggests three grounds upon which it will be contended that the offices of alderman and common clerk are incompatible with each other:—first, that the aldermen vote at the election of the common clerk; secondly, that when the defendant was elected common clerk, there was a salary attached to the office, which might be varied in amount, or withdrawn, at the pleasure of the mayor, aldermen, and bailiffs; and, thirdly, that the common clerk must be in attendance at corporate meetings, and take minutes of all the proceedings. Now, in order to prove that the two offices are incompatible with each other, it must be shewn, first, that the duties to be performed by the person holding the one office, are inconsistent with the duties to be performed by the person holding the other; and, secondly, that those duties are of a public nature, so that the public will sustain an injury by their being improperly discharged. Unless both those points be made out, this Court will not interfere. For instance, a ministerial and a judicial office in the same court cannot be held by the same person; nor can the same person discharge the duties of expending public money, and of auditing his own accounts. But it has never hitherto been decided that a man may not hold



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two offices merely because by virtue of the one he has a voice in the election to the other; nor merely because in the one capacity he may have a voice in fixing the remuneration which he is to receive in the other. A candidate may vote for himself at an election of members of parliament, and at elections to most parish offices. A man may present himself to a church. In this case, the number of aldermen is indefinite; consequently, the influence of one in fixing the salary of the common clerk would be very trifling; and that, is not a public duty. No objection can arise upon the ground of these offices' being, one of them judicial, and the other ministerial, because the aldermen are not magistrates; nor can there be any reasonable objection to one member of the body's being employed to take minutes of their proceedings. In Com. Dig. "Franchise," (F. 27), upon which the other side will probably rely, it is said, that the office of sworn clerk is void, if he be made an alderman; and Dyer, 332 b. is cited. But that is not a principal case, but a very brief note of one mentioned in the margin, where a town clerk was elected alderman with a view to the turning him out of the former place, the offices being incompatible; and the Court of King's Bench restored him to it: but the respective duties of the two offices are not mentioned (a). *Rex v. Pateman* (b) is more analogous to the present case; but there the accounts of the town clerk were audited by the aldermen, and they were

(a) The note in *Dyer* is, *verbatim*, this:—"Baston, being town clerk of B., was elected alderman, for the purpose of putting him out of his office, because they were incompatible offices in one person. He prayed restitution to the office of town clerk, and it was granted."

(b) 2 T. R. 777. "Where the town clerk's accounts are allowed by the aldermen, or where a town clerk acts ministerially under the

aldermen, who are judicial officers, the offices are incompatible; and the appointment to the former office is equivalent to a motion by the corporation from the latter office. And if the person so appointed continue to exercise the office of alderman, the Court of King's Bench will grant an information in the nature of a quo warranto, against him."

judicial officers, and the town clerk acted ministerially under them: and there Lord *Kenyon* said, "I do not think that the offices of alderman and town clerk are necessarily incompatible; for in some corporations," (as in the present), "the aldermen are not judicial officers." in *Milward v. Thatcher* (a), of the two offices held by the same person, the one was judicial, and the other ministerial; and upon that ground, expressly, the offices were decided to be incompatible.

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*Campbell*, with whom were *R. Bayly* and *Barstow*, contra, was stopped by the Court.

LORD TENTERDEN, C. J.—I am of opinion that judgment must be given for the crown in this case. The fifth replication shews that it is the duty of the common clerk to attend the corporate meetings, and to take minutes of their proceedings. If that duty be not discharged faithfully, he may be removed from his office of common clerk, and upon that question he would have a vote in his character of alderman. In such a state of things he would fill the two incompatible situations of master and servant. That replication, therefore, is a good answer to the defendant's plea. Again, the fourth replication alleges that the common clerk has a yearly salary, subject to be varied in amount, or to be withdrawn altogether, at the pleasure of the mayor, aldermen and bailiffs. The defendant, as an alderman, would have to vote upon that question, a duty which I think he is not competent properly to perform, being at the same time the party to receive the salary. That replication, therefore, as well as the fifth, is a good answer to the plea.

(a) 2 T. R. 81. "A jurat of the corporation of Hastings may be elected town clerk of the same corporation. But the two offices are incompatible, and the acceptance of the latter, though an inferior office, will vacate the former."

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BAYLEY, J.—I consider the two offices as clearly incompatible, where the holder cannot in every instance, without any improper bias on his mind, discharge the duties of each. Here, upon the two questions of motion and salary, the common clerk cannot, for the reasons mentioned by my lord, be competent so to discharge his duty as an alderman. His acceptance of the second office, therefore, has vacated the first.

LITLEDALE, J.—I entirely concur, for the reasons which have been given. I must also add, that I entertain great doubts whether the holding of two offices by the same person is ever contemplated in the charters granted to corporations.

Judgment for the Crown (a).

(a) *Parke, J.*, was gone to chambers.

The President and College or Commonalty of the Faculty  
 of Physic in LONDON v. HARRISON.


By charter granted to the College of Physicians, confirmed by statute, no one shall practise physic within the city of London, or 7 miles round, unless licensed by the college, under a penalty of 5*l.* for every month he so practises, to be sued for by the college, payable half to the king and half to the college. The penalty is a debt vested in the college, the withholding of which is an injury for which damages may be recovered; entitling the college to receive costs if they succeed, and rendering them liable to pay costs, under 4 *Jac.* 1, c. 3, s. 2, where they fail.

DEBT for penalties. The first count of the declaration stated, that whereas *Henry* 8, by letters-patent of 23d September, in the 10th year of his reign, did, *inter alia*, grant to certain persons therein named, that they should be a body and commonalty, or a perpetual college, and that they might sue by the name of the President and College or Commonalty of the Faculty of Physic in London; and that no one should exercise the said faculty in the said city, or within seven miles round the same, unless he was admitted thereto by the president and commonalty, or their successors, by the letters of the president and college, sealed with their common seal, under the penalty of 5*l.* for every month he should exercise the same faculty without

the king and half to the college. The penalty is a debt vested in the college, the withholding of which is an injury for which damages may be recovered; entitling the college to receive costs if they succeed, and rendering them liable to pay costs, under 4 *Jac.* 1, c. 3, s. 2, where they fail.

being so admitted ; one moiety to be applied to the king, and the other moiety to the president and college. Averment, that the letters-patent were accepted, and that they were afterwards ratified by act of parliament. Nevertheless the defendant, who is not, nor at any time has been admitted by any letters of the president and college or commonalty to exercise the faculty of physic in the city of London, or within seven miles of the same, not regarding the statute and letters-patent, nor the penalty therein contained, on &c., and for three months then next following, did exercise the faculty of physic within seven miles of the city of London, contrary to the statute and letters-patent, by which an action has accrued as well to our lord the now king, as to the president and college or commonalty, to demand and have of the defendant the sum of 15*l.*, being 5*l.* for each month during which he practised as aforesaid. Second count, that the defendant, who is not nor at any time has been admitted by any letters-patent of the president and college or commonalty to exercise the faculty of physic in the city of London, or within seven miles of the same, not regarding the statute in that case made and provided, nor the letters-patent, after the making of the statute, and before the exhibiting of this bill, to wit, on &c., and for six months between that day and the exhibiting this bill, did exercise the faculty of physic within seven miles of the city of London, by which an action has accrued as well to our lord the king as to the president and college or commonalty, to demand and have of defendant 30*l.*, being 5*l.* for each month during which he practised as last aforesaid : Yet the defendant, although requested, hath not rendered the said sum of 45*l.* above demanded, to our lord the king and to the president and college or commonalty, who sue as aforesaid, or to either of them, but to render the same to our lord the king and the said president and college or commonalty, or to either of them, hath hitherto altogether refused, and still doth refuse. And therefore, as well for our said lord the king *as for themselves* in this behalf, the

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said president and college or commonalty bring *their* suit, &c. Plea, nil debet, and issue thereon. At the trial before Lord *Tenterden*, C. J., at the adjourned Middlesex sittings after Trinity term, 1827, the jury found a verdict for the defendant.

The Master, upon consideration, and having read the opinions of learned persons upon the point, which opinions had been taken by the respective parties, thought that the defendant was entitled to his costs, and allowed them accordingly on taxation. A rule nisi was afterwards obtained for the Master to review his taxation, upon the ground that the College of Physicians, not being parties aggrieved, could not have recovered costs if they had succeeded, and consequently that the defendant, having succeeded, was not entitled to costs.

*Campbell* and *Armstrong* shewed cause. It is enacted by the statute 7 *James* 1, c. 3, s. 2, that if *any* person shall commence *any* action wherein the plaintiff might have costs if judgment should be given for him, and the plaintiff be nonsuited, or the verdict pass against the plaintiff, the defendant in *every* such action shall have judgment to recover his costs against the plaintiff. The question, therefore, is, whether the plaintiffs in this case would have been entitled to costs if they had obtained a verdict, because if they would, it follows necessarily that the defendant is entitled to costs, the verdict having been found in his favour. Now these plaintiffs clearly would have been entitled to costs if they had obtained a verdict, because it is an established rule, acted upon in many decided cases, that in an action of debt, by a party aggrieved, upon a statute, for a fixed penalty, the plaintiff shall recover not only the penalty, but also his costs of suit, although the statute does not expressly give costs; and for this reason, that the penalty is a debt vested in the party aggrieved as soon as the offence prohibited by the statute is committed, and the action brought by him for that penalty is like the

common action upon a bond brought for a debt previously due. Now, in the latter case, the plaintiff is entitled to recover damages for the detention of the debt, and consequently he is also entitled to recover costs under the provision of the Statute of Gloucester (a), *North v. Wingate* (b), *Corporation of Plymouth v. Collings* (c), *Company of Cutlers in Yorkshire v. Ruslin* (d), *Ward v. Snell* (e), and *Tyte v. Glode* (f). And the rule holds good where the penalty is given to the party aggrieved by an act subsequent to the Statute of Gloucester, and where a moiety of it is given to the crown; *Mayor and Commonalty of Plymouth v. Werring* (g). But, it will be said, the plaintiffs in this case were not parties aggrieved, and therefore do not come within the operation of the rule. But they clearly were parties aggrieved. The moment the defendant had committed the offence prohibited by the statute, the penalty became vested in the plaintiffs, as a debt then due; and the wrongful detention of that debt, after demand, was a grievance to them. The wrongful detention of any debt after demand, however it arise, whether by statute or upon contract, is a grievance to the person claiming it. If it should be urged that the public are the parties aggrieved, and not the plaintiffs, still the plaintiffs represent the public, and are the only persons authorised to sue; or it may be fairly answered, that the plaintiffs have a privilege beneficial to themselves, the infringement of which renders

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(a) 6 *Edw.* 1, c. 1, which enacts, sect. 2, that the demandant may recover against the tenant the costs of his writ purchased, together with the damages abovesaid. *And this act shall hold place in all cases where the party is to recover damages.*

(b) *Cro. Car.* 559.


(c) *Carth.* 230.

(d) *Skinner*, 363.

(e) 1 *H. Bl.* 10.

(f) 7 *T. R.* 267.

(g) *Willes*, 440. In *Tyte v. Glode*, 7 *T. R.* 267, which was an action against a sheriff, under the 29 *Elizabeth*, c. 4, for extortion, it was laid down generally, that where, by any statute passed since the Statute of Gloucester, an action is given to the party aggrieved, he is entitled to costs, though he had no remedy prior to the passing of such statute. And see *Cresswell v. Hoghton*, 6 *T. R.* 355, to the same effect.

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them parties aggrieved, and gives them a right of action. Besides, the construction put upon this statute by the college themselves on former occasions, shews that they considered themselves entitled to costs; for in a book published by Dr. Goodall in the year 1684, under the authority of the college, it is stated, that in actions brought by the college against Dr. *Bonham*, Dr. *Gardiner*, and Dr. *Harden*, they recovered costs.

*Scarlett* and *Brougham*, contra. The plaintiffs were not parties aggrieved, nor did they sue in that character. The crown and the legislature, when they required all persons practising physic in London and its environs to be licensed by the College of Physicians, had the interests of the public, not those of the college, in view; their sole object being to secure to the public respectable and skilful practitioners. The public, therefore, and not the college, are the parties aggrieved when any unlicensed person practises within the prescribed limits. The president and college are only empowered to put the law in force for the protection of the public; they are, in a word, mere trustees for the public. The damage consequent upon the violation of the law, is done to the public, not to the college; the penalty is imposed for the protection of the public, not of the college: and it follows that the college sue, not as the parties aggrieved, but as trustees for the public, who are the parties aggrieved.

*Cur. adv. vult.*

Lord TENTERDEN, C. J.—The question in this case was, whether the plaintiffs, having failed in their action, were liable to pay the defendant's costs. It was very properly conceded in the argument, that if the plaintiffs would have been entitled to recover costs in the event of their obtaining a verdict, the defendant, who did in fact obtain a verdict, is entitled, under the statute 4 *James* 1, c. 3, s. 2, to be paid his costs: and we are of opinion, that in a case


like this, the plaintiffs would have been entitled to costs if they had succeeded, and therefore that they are liable to pay costs, having failed. Our opinion that the plaintiffs would have been entitled to costs if they had succeeded, is founded upon this, namely, that where a right is vested in a particular individual or corporation, the withholding of that right, and thereby compelling the party to enforce it by an action, is in point of law an injury for which damages may be recovered; and if damages may be recovered, then costs will follow. That is the foundation of our opinion upon the present occasion, and that opinion is warranted by several cases which have been decided upon this subject. The case of *The Company of Cutlers in Yorkshire v. Ruslin* (a) is one. That was an action upon a private act of parliament, for a penalty imposed by that act, for retaining an apprentice contrary to the provisions of the act. It was held by *Holt*, C. J., and the whole Court, that "where a statute gives a penalty to the party grieved, to be recovered by action, bill, plaint, &c.; this being a duty to the party, vested before the action brought, he shall have costs against the defendant, because he is put by the defendant to the cost and trouble of a suit; but in a *qui tam* or other popular action, where the duty is not vested till the suit or information brought, there his interest commencing by the suit, and not being a duty vested before, he shall not have costs against the defendant." There are two other cases which appear to have proceeded upon the same principle, and to establish it. The first in order of time is that of *North v. Wingate* (b). That was "error of a judgment in debt upon the statute of 1 & 2 *Phil. & Mar.* for taking tenpence for a distress, where by the statute fourpence only should be taken, unless in places where it is otherwise accustomed, under a penalty of 5*l.* The defendant pleaded *nil debet*, and the jury found a verdict for 5*l.* penalty, and assessed damages twopence, and costs 53*s.* 4*d.*; and the Court increased the costs to 7*l.*, and judgment was given that the

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plaintiff should have writ for the said 5*l.*, and the said damages and costs. It was assigned for error that no damages or costs ought to be given, because it was a penal statute, and a penalty being given by the statute, the plaintiff ought not to have any costs or damages, but the penalty only. But all the Court resolved that the judgment was good and ought to be affirmed; for where a statute gives a penalty certain, and an action of debt, then if the defendant does not pay it upon demand, but enforces the party to a suit, and he recovers by action of debt, *ex consequenti*, he shall recover his damages, because he did not pay the duty due by the statute upon demand; and he shall also recover costs, for otherwise he should be at a loss to expend more than he recovers, which the statute never intended." It is to be observed of the present case, that the penalty is given to a particular corporation, which distinguishes this from the case where a penalty is given to a common informer, who has no right vested in him till he brings the offence home to the defendant. The remaining case is that of *The Mayor and Commonalty of Plymouth v. Werring (a)*. That was an action of debt for a penalty brought by the corporation on a private act of parliament, made 27 *Elizabeth*, c. 20. The plaintiffs sued as well for the king as for themselves, for the penalty of 20*l.* given, half to them and half to the king, by that statute. The defendant pleaded *nil debet*, and the plaintiffs were nonsuited at the assizes. The question was, whether the defendant was entitled to costs. All the authorities were there considered, and the Court decided, that "where a penalty is given by a statute (even subsequent to the Statute of Gloucester) to the party grieved, he is entitled to costs if he succeed; and if he be nonsuit, or a verdict pass against him, he is liable to pay costs to the defendant, either under the 23 *Henry* 8, c. 15, or the 4 *James* 1, c. 3, which gives costs to the defendant in all cases where the plaintiff is entitled to costs if he succeed." The ground

(a) Willes, 440.

upon which the present action proceeded was, that the plaintiffs had sustained an injury in consequence of the defendant not having paid them a sum of money which had accrued due to them, by reason of the defendant's having practised as a physician without their licence within certain limits. The withholding of that debt by the defendant, and his compelling the plaintiffs to sue for it, was an injury for which damages were recoverable; and if so, costs would follow as a matter of course. Upon the principle laid down in the cases I have referred to, we are of opinion that the plaintiffs, had they succeeded in the action, would have been entitled to receive costs, and that having failed, as a necessary consequence, they are liable to pay costs. The result is, that this rule must be discharged.

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Rule discharged.

ROTHSCHILD v. HENNINGS, in Error.

**ASSUMPSIT** for money lent, money paid, laid out and expended, money had and received, and on an account stated. Plea, non assumpsit. At the trial before *Burrough*, J., at the sittings at Guildhall after Michaelmas term, 1823, a special verdict was found, which stated that *Rothschild*, the defendant below and plaintiff in error, on the 14th October, 1822, made and signed six receipts, which are set out in the verdict, one of which was in the following form:—

“ Neapolitan Loan, by *N. M. Rothschild*, contracted by  
*C. M. de Rothschild*.

Neapolitan five per cent. certificates, No. 433, with interest from the 1st July, 1822.

Received one hundred and thirty-seven pounds, four shillings, and eight-pence, being ten per cent. on ducats 500, Neapolitan *Rente*(a). On payment of the balance on

(a) i. e. annuity of 500 ducats.

contractor to accept the instalments with interest, or return the deposit.

A party who pays a deposit to a loan contractor upon a scrip receipt, entitling him to a certain portion of the loan on payment of the subsequent instalments, receives a full equivalent for the deposit in the option to become a holder of stock; and if he omit to pay such instalments at the stipulated periods, he cannot afterwards require the

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or before the 1st of February, 1823, with four per cent. interest thereon from the 15th October, 1822, the bearer will be entitled to certificates for that amount of stock, with interest *coupons* (a), from the 1st July, 1822.

Ducats 500, *rente*, at 80 per cent. (b); exchange, fr. 4.40, per ducat, and fr. 25.65, per £ *st*<sup>s</sup> (c). £ 1372 6 5  
 10 per cent. deposit . . . . . 137 4 8

Balance, to pay the 1st of February, 1823, with  
 4 per cent. interest from 15th October, 1822, £ 1235 1 9

Ent<sup>d</sup>. C. H. Thiel, London, 14th October, 1822.  
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The verdict then set out five other scrip receipts in the same form, viz. No. 434, for *rente* 500 ducats; No. 554, for *rente* 1000 ducats; No. 650, for *rente* 1000 ducats; No. 651, for *rente* 1000 ducats; and No. 972, for *rente* 500 ducats.

Upon obtaining these receipts, one *Lowe*, on the 14th of October, 1822, paid to *Rothschild* the sum expressed therein, being 1235*l.* 1*s.* 9*d.* On the 2d December, 1822, *Hennings*, the plaintiff below and defendant in error, became possessed of these receipts for a valuable consideration. On the 14th January, 1823, the following advertisement was inserted by *Rothschild*, in the *Times* newspaper:—

" Neapolitan Loan of 1822.

Mr. N. M. *Rothschild* begs to notify to the holders of the deposit receipts of this loan, that the parties may either pay them in full on the 1st of February next, according to agreement, or that this period may be extended, at their option, on condition of a further payment of 10*l.* per cent. on the stock being made on the 1st of February next, with the interest due on the receipt up to that day; 10*l.* per cent. on ditto on the 1st of March next; 20*l.* per cent. on ditto on the 15th of April next; 10*l.* per cent. on ditto on the

(a) Dividend warrants.

(b) Meaning, it is presumed, 16 years purchase, though no capital is mentioned to which the 80 per cent. can be referred.

(c) This circuitous mode of expressing the value of Neapolitan currency will bring the ducat to between 3*s.* 5*d.* and 3*s.* 5½*d.* sterling.

15th of May next; and the remainder on the 15th of July next, with interest at the rate of 4l. per cent. from the 1st of February, payable as these amounts become due. At the time the foregoing payments are made, the parties will be allowed to receive bonds equivalent to the amount paid, or as nearly so as the case will admit. Those persons who intend availing themselves of the extension here granted, are desired to leave their receipts at Mr. *Rothschild's* counting-house any day between the 20th and 25th instant, in order that the same may be duly marked and other receipts prepared for delivery on the 1st of February.

New Court, London, 11th January, 1823."

On the 21st January, 1823, the following note was sent by *Hennings* to *Rothschild*.

"I beg leave to hand you enclosed six 10 per cent. certificates of the Neapolitan loan, amounting as per specification at foot to 4500 ducats rentes, on the capital of which 12,350l. 17s. 6d. I wish to avail myself of your offer to pay on the 1st of February, 10 per cent. only. And I request, therefore, that you will have the goodness to cause the certificates to be prepared to that effect."

The receipts were accordingly marked by *Rothschild*, "4500 ducats, per *C. F. Hennings*." The following advertisement was inserted by *Rothschild* in the Times newspaper of 24th January, 1823.

"Neapolitan Loan of 1822.

At the request of several of the holders of the Neapolitan Scrip receipts, a further extension for the payment of the balances will be granted by Mr. *N. M. Rothschild*, as follows, viz.:—

5 per cent. to be paid on the 1st February next, with the interest due on the receipts up to that day.

|                                               |                                                                                                                 |
|-----------------------------------------------|-----------------------------------------------------------------------------------------------------------------|
| 5 per cent. to be paid on the 1st March next, | } with interest<br>at the rate of<br>4 per cent.<br>from 1st Feb.<br>payable as<br>these amounts<br>become due. |
| 10 do. . . . . 15th April                     |                                                                                                                 |
| 10 do. . . . . 15th May                       |                                                                                                                 |
| 10 do. . . . . 15th June                      |                                                                                                                 |
| 10 do. . . . . 15th July                      |                                                                                                                 |
| And the balance . . . 15th August             |                                                                                                                 |

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The parties who intend availing themselves of this arrangement, will leave their receipts at Mr. Rothschild's counting-house, as pointed out in his advertisement of the 11th instant, in order that new scrip receipts of corresponding amounts may be prepared for delivery on the 1st February next.

New Court, London, 23rd January, 1823."

And the following was inserted in the *Times* of 5th February, 1823.

" Neapolitan Loan of 1822.

Many of the holders of Neapolitan deposit receipts having failed to comply with the tenor of those engagements, by which the parties were required to pay the balances thereof on the 1st February, 1823, with the interest accruing up to that day, and not having availed themselves of the terms proposed for their accommodation in the advertisements of the 11th and 23rd January last, public notice is given by Mr. *N. M. Rothschild*, that such receipts are void, that the deposit money is forfeited, and that all obligation has ceased on his part to deliver certificates at a future period. Being desirous, however, that no individual should suffer unknowingly on this occasion, Mr. *Rothschild* hereby notifies, that he will grant to the holders of his receipts an indulgence of one week from this date, either to pay the balances due by them on the 1st instant, or to take the further deposits called for by the advertisements of the 11th and 23rd January last.

New Court, 5th February, 1823."

The following advertisement appeared in the *Times* newspaper of 11th February, 1823.

" Neapolitan Loan of 1822.

Referring to the several advertisements of the 11th and 23rd of January last, and 5th February instant, which have appeared in the public papers, giving an extension of time for payment of the balance due upon scrip receipts for the Neapolitan loan, Mr. *N. M. Rothschild* informs the holders of scrip receipts, that the loan contracted for has been paid,

and the stock certificates are ready for delivery; and he begs that those who have not accepted the terms of extension of payment will take notice, that, unless the terms be accepted, or the balances and interest thereon be paid on or before the 20th day of February instant, he will consider that such holders of scrip receipts do not intend to complete their contracts, and will not hereafter claim the certificates. Mr. *N. M. Rothschild* will, therefore, after the 20th February instant, dispose of or keep the certificates, and put the proceeds or value of them to the credit of the holders on account of the balances and interest due, and hold them answerable to him for any loss or deficiency."

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On the 11th March, 1823, *W. H. Green*, as attorney for *Rothschild*, addressed the following letter to *Hennings*.

"I am desired by Mr. N. M. Rothschild to express to you his surprise that you have not yet made the further payments on the Neapolitan scrip engagements, specified in your letter of the 21st January last, having there stated that you should avail yourself of the terms of his offer. With every desire to avoid the adoption of measures which might be unpleasant to you, he cannot suffer a matter of this consequence to remain unsettled, and my instructions are to commence proceedings against you forthwith, if these payments be not immediately made."

On the 14th May following, *Hennings* tendered to *Rothschild* 11,375*l.*, being the amount of the instalments at 5 per cent. interest, which *Rothschild* declined accepting, saying, that *Hennings* was too late. On the 3rd June, *Hennings* wrote to *Rothschild* as follows:—

"I beg leave to say, I again offer to pay you the balance with interest up to the present time, remaining due upon the scrip receipts 4500 ducats Neapolitan rentes, upon having the stock certificates with interest coupons belonging thereto delivered to me; and if you continue to refuse to deliver the said stock certificates, I require an immediate return of the deposit money received by you upon those scrip receipts, with interest thereon, and if you decline

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to do either, which, on consideration (especially as my claim stands on different grounds from those of other holders of Neapolitan scrip) I trust will not be the case, I shall be under the necessity of commencing an action against you to recover the same."

*Rothschild* refused to comply with these requests, Neapolitan scrip began to fall on the 1st February, 1823, and continued to fall until the latter end of April, and fell to 67; but in the beginning of May, the scrip rose above 8 per cent. from its lowest price (a).

The Court of Common Pleas, after argument, gave judgment in favor of *Hennings*, the plaintiff below, and defendant in error; and a writ of error being brought, the plaintiff in error assigned the following errors:—

That the judgment ought to have been given for him, because it does not appear that he ever received any money whatsoever of or belonging to *Hennings*, so that no action for money had and received could be maintained by *Hennings* against *Rothschild*; and also because the original contract in the special verdict mentioned, was made between *Rothschild* and *Lowe*, the original holder of the said scrip receipts, and that there never was any legal transfer of any right from *Lowe* to *Hennings* so as to entitle the latter to maintain any action against *Rothschild*; and also because the money received by *Rothschild* could not be recovered back as money received by him on a consideration which had failed, because *Hennings* had had all the consideration for which he had paid the money, viz. the option to take the stock at a certain time.

To these errors *Hennings* pleaded in nullo est erratum.

*F. Pollock*, for the plaintiff in error. In the Court of Common Pleas two points were made. First, whether the action could be maintained in respect of the sufficiency of

(a) The variation in the price of Neapolitan scrip seems to be inserted in the special verdict for the purpose of explaining the motives of the parties. It could not affect their rights.

the condition? Secondly, whether an action for money had and received would lie? Upon the argument in the Court below, *Best*, C. J. is reported to have said, "undoubtedly it appears that the plaintiff in this case did not comply with those conditions with which he ought to have complied, and, therefore, it is perfectly clear that he forfeited his right to recover the certificates for the loan, because, I take it, it is a condition precedent to his recovering the certificates for the loan, that he should make the payments at the periods stipulated; but that will not bear upon the present question, though our attention has been ingeniously attempted to be drawn away from the consideration of that question by discussing it as if this were a claim for the certificates for the loan, and not for the deposit money. The plaintiff, undoubtedly, was endeavouring to play fast and loose. Whilst it was a losing concern he was not desirous of making further advances; the moment it became a concern out of which he was likely to derive a profit, he was extremely desirous, if he could, to pay up what he forbore to pay whilst it was a losing concern, and claimed the benefit of the contract which had been entered into with him. I have already stated that the plaintiff had not complied with the condition contained in the first advertisement, nor had he paid any of the instalments which became due from the 1st February to the 14th May; and from these circumstances it appears that, by the enlarged time given for the raising of this money, several instalments had in the intermediate time become due." His lordship also says, "Cases which have been decided upon the principle that if a contract be put an end to, one of the contracting parties may recover back money which has been advanced upon it, as money that has been advanced upon a consideration that has failed, have been cases where the default has been on the part of the defendant, and no default on the part of the plaintiff. This case is different to those, because in this case, undoubtedly, the present plaintiff has been the defaulter. He has failed in the performance of

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the condition in the first contract, and he has failed in the subsequent payments. The question therefore is, he himself being a defaulter, is he entitled under the circumstances of this case to recover the deposits? The defendant in some of his subsequent advertisements has stated, that the deposits were forfeited; but it is not his declaration that will amount to a forfeiture of the money unless that condition exist in the original contract made between him and the parties. Now it will be observed, that in the original contract, which is evidenced by the first receipts, there is no such condition as that the deposits shall be forfeited, if the further sums of money which are to be paid for the purpose of completing the plaintiff's right to the certificates of the Neapolitan loan shall not be made. We are of opinion, that there being no such condition as that in the original contract, the plaintiff has a right to recover the deposits under the circumstances which have occurred in this case." *Hennings*, conceiving that it was a losing concern, meant to throw the loss upon *Rothschild*. The option which he had of keeping or rejecting the stock was sufficient consideration. Here, *Hennings* meant to avail himself of his option, and it is manifest that he intended to throw the loss upon *Rothschild*. The deposit money was paid for the option to pay more in February and take the stock. He assented to the alteration in the mode of payment proposed by *Rothschild*, and got the receipts marked. If this stock had risen, *Rothschild* could not have said to *Hennings*, take your 10 per cent. deposit, and return me your scrip receipts. In *Doloret v. Rothschild* (a) this point was raised upon a demurrer to a bill filed by a person standing in the same situation as *Hennings*. The demurrer was allowed, and on that occasion the present Master of the Rolls, then Vice Chancellor, expressed himself to the following effect: "When a court of equity holds that time is not of the essence of a contract, it proceeds upon the principle that having regard to the nature of the subject, time is imma-

(a) 1 Sim. & Stuart, 590.

terial to the value, and is urged only by way of pretence and evasion. But that principle can have no application to a case like the present, where, from the nature of the subject the value is exposed to daily variation, and the contract which was disadvantageous to the plaintiff on the 1st of February, and would, therefore, be then declined by him, might be highly advantageous to him on the 2d February. It is true, as stated in the bill, that the time mentioned in the scrip receipts has been waived and abandoned by the advertisements of the defendant; but that waiver was upon the condition that the holders of the receipts made their payments at the extended times stated in the advertisements, which it is admitted has not been done by the plaintiff. The claim of the plaintiff to have the original deposit of 10 per cent. returned to him, as being retained by the defendant without condition, cannot be maintained, because the plaintiff had full consideration for that deposit in the option which the scrip receipts gave him to become the proprietor of so much stock, by payment of the balance of the stipulated price on the day named; and it is not the less a consideration because the plaintiff did not think fit to avail himself of the option." But supposing an action to be maintainable, money had and received is not the proper remedy. The plaintiff should have declared specially on the contract. A contract cannot be rescinded unless the parties be placed in statu quo, *Giles v. Edwards* (a).

*Comyn, contra.* This case rather resembles *Hunt v. Silk* (b) than *Giles v. Edwards*. Nothing has been done here by either party which would prevent their being placed in statu quo. Upon the sale of an estate, it is usual to stipulate that the abstract of title shall be completed within a certain number of days. Though time is of the essence of a contract, it may be waived (c). *Hennings* is identified in this contract by *Rothschild*, who treated with

(a) 7 T. R. 181.

(c) *Vide ante*, vol. iii. 95, 96, n.

(b) 5 East, 449; 2 Smith, 15.

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*Hennings* as a person entitled under *Lowe*. *Rothschild* was bound to deliver the scrip receipts. He extended the time without any application. Though a party be guilty of a breach of part of a contract, he is not shut out from insisting that the contract has since been rescinded by the other party. Ex parte *Hale* is a very different case from the present. So, in the case of *Doloret v. Rothschild*, there was no treaty going on between the parties. The Master of the Rolls did not lay down any positive rule of law. Secondly, it has been clearly established that money had and received will lie for a person who was not originally a party, *Dutch v. Warren* (a), *Curon v. Chadley* (b), *Hodgson v. Anderson* (c), *Wharton v. Walker* (d), *Grant v. Vaughan* (e). Whoever was the bearer of the scrip was entitled to all the benefits or subject to all the liabilities arising out of such a contract.

*Pollock*, in reply. The loan was taken originally at 80; *Hennings* purchased at 72 (f). This purchase (supposing the contract to be legal) could not entitle *Hennings* to maintain an action for money had and received. If *Hennings* is entitled to relief, it is in equity. Here time is of the essence of the contract. It may be assumed that *Rothschild* sustained no damage. The stock had fallen from 80 to 67, and *Rothschild* possessed no means of compelling payment, neither *Lowe* nor *Hennings* having signed any contract with him. [Lord *Tenterden*, C. J. If persons were required to sign an undertaking, the loan contractors would find few subscribers.]

*Cur. adv. vult.*

LORD TENTERDEN, C. J. now delivered the judgment of the Court. After stating the facts found by the special verdict,

(a) 1 Str. 406, more fully reported 2 Burr. 1011.

(b) 5 D. & R. 417; 3 B. & C. 591; 1 Carr. & P. 174.

(c) 5 D. & R. 735; 3 B. & C. 842.

(d) 6 D. & R. 288; 4 B. & C. 163. And see *ante*, vol. iii, 448, (a).

(e) 3 Burr. 1516; 1 W. Bla. 485.

(f) This fact did not appear on the face of the special verdict.

his lordship observed that the counsel for the plaintiff in error, though he had argued that the form of the action was misconceived, chose to rest his case principally on the merits, contending, that as *Hennings* had not complied with the original terms, or with those afterwards proposed, he had broken the contract, and could neither recover damages for its non-performance, nor claim a return of the money advanced, on the footing of the contract being rescinded, inasmuch as *Hennings* had received a full consideration for the moneys advanced in the engagement of *Rothschild* to deliver the certificates upon payment of the residue, and the case of *Doloret v. Rothschild* was cited. There a bill was filed by a holder of these scrip receipts, who had offered no further payment until June, 1823, when he filed his bill to compel *Rothschild* to deliver the certificates or return the deposits. *Leach*, V. C. observed, that time was material in a case like the present, because the value was exposed to daily variation. That the time of payment originally proposed had been waived by *Rothschild* only upon condition that the payment should be made at the extended times, and that the claim of *Doloret* to a return of the deposit, as being retained by the defendant without consideration, could not be maintained, for he had full consideration for the deposit in the option which the scrip receipts gave him to become the proprietor of so much stock by payment of the balance of the price at the stipulated time. In this opinion my learned brothers *Bayley* and *Littledale* and I fully concur. My brother *Parke* having been counsel in the cause has taken no part in the discussion. The judgment of the Court below, therefore, must be reversed.

Judgment reversed (a).

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(a) And as to the form of the action, see *Ward v. Evans*, 2 Ld. Raym. 928; *Fenner v. Meares*, 2 W. Bla. 1269; *De Bernales v. Fuller*, 14 East, 590; *Vere v. Lewis*, 3 T. R. 182; *Tatlock v. Harris*, 3

T. R. 174; *Surtees v. Hubbard*, 4 Esp. N. P. C. 204; *Phillips v. Bateman*, 16 East, 356; *Wilson v. Coupland*, 5 B. & A. 228; *Fairlie v. Denton*, ante, ii. 363, 8 B. & C. 395.

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SAMPSON and another v. EASTERBY.

In a lease by B. to A. of an undivided third part of a mine with the appurtenances, a recital that A. had agreed with B. and with C. and D. the other owners of the mine, to erect a smelting-mill on a waste not demised and not shewn to belong to B. or to B. C. and D., was held to raise a covenant by implication between A. and B. for the erection of such mill.

And it was held, that such covenant ran with the land, and passed to the assignee of the reversion of B.'s purparty of the mine.

**COVENANT** by assignee of reversion against lessee. The declaration stated, that Sir *Charles Turner* being seised in fee of one undivided third part of certain tenements with the appurtenances, by an indenture between Sir C. T. of the one part, and defendant and five others of the other part; after reciting that Sir C. T. had on &c., agreed with the defendant and the five co-lessees to demise to them for 21 years the undivided third part of Sir C. T. in certain mines, minerals and quarries, at a certain rent, and subject to certain covenants and agreements; and that defendant and the said co-lessees had entered upon and taken possession of the said purparty of the said Sir C. T.; and that defendant and the co-lessees had since, with the permission of Sir C. T. and of W. S. and F. F., the owners of the other two third parts of the said mines, minerals and quarries, taken down a smelting-mill belonging to Sir C. T., W. S. and F. F., situate upon part of a waste ground within the manor of A., called O. M., and that the defendant and the co-lessees had engaged to erect, at their own expense, a smelting-mill of larger dimensions with several adjoining buildings upon another part of the waste ground, which mill and buildings, it had been agreed, should belong to Sir C. T., W. S. and F. F., in lieu of the buildings so taken down; the said Sir C. T. did demise to the defendant and the co-lessees all that undivided third part of Sir C. T. of and in the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils then known, found, or discovered, or which should during the continuance of that demise be opened, known, found, discovered, or gotten, in &c., the moors, commons, wastes, and uninclosed lands, within or parcel of the several manors or lordships of A., N., T., and H., in the county of York, and also of and in all mines and seams of coal, and quarries of stone in or within the said manors &c.; and also of and in all

smelting-mills, stamping-mills &c., standing or being in or upon any part of the said moors, commons or wastes, then and theretofore used for mining purposes, and also full power and authority to erect and build in or upon any part of the said moors, commons, wastes and uninclosed lands, all such smelting-mills, stamping-mills &c., as might be requisite for effectually working the said mines. Habendum to defendant and the co-lessees, their executors, administrators and assigns, from the 1st day of January, 1800, for 19 years. And the defendant did thereby for himself, his heirs, executors, administrators and assigns covenant with Sir C. T. his heirs and assigns, that defendant and the co-lessees, their executors, administrators and assigns, should, during the continuance of the demise maintain, preserve and keep the smelting-mill so engaged to be erected and built by them, and other buildings erected or to be erected contiguous or near to the said mill, in good and sufficient repair, and should, at the expiration of the term, deliver up the same in good and sufficient repair, and deliver up in good and sufficient repair all forges &c., used within the last two years of the term. The declaration then deduced the title of the plaintiff as assignee of the reversion and assigned breaches; first, in the non-erection by the defendants and co-lessees of a smelting-mill of larger dimensions than the mill taken down; secondly, in not keeping such smelting-mill &c. in good repair; thirdly in not delivering it up at the expiration of the term.

To this declaration, there was a general demurrer and joinder.

*Brodrick*, in support of the demurrer. The first question is, whether this lease contains any covenant to erect. The second is, whether, supposing such covenant to be contained in the indenture, it passed with the reversion to the plaintiff, no part of the waste being demised to the lessee. Upon the first point, there is no covenant with Sir C. T. It may be admitted that an implied

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covenant is sufficient, and that such implied covenant may be collected from the whole of the lease. Here, taking the whole together, and looking particularly at the recital, the covenant, if any, would be with Sir C. T. and others, and not with him alone. An implication will be attempted to be raised on the part of the plaintiff, from the words, "will maintain, preserve and keep the said smelting-mill, engaged to be erected and built by them, in good and sufficient repair." It is material to look at the recital, which shews that the agreement was with three, and not with Sir C. T. alone. [*Bayley, J.* But persons entitled to the other two-thirds were not parties to the action.] The smelting-mill was not standing when the lease was granted. That which was taken down belonged to the three. So would the smelting-house which was to be erected. The lease contained no demise of the smelting-house which was to be thereafter erected. The law will not imply a covenant with the lessor alone in respect of that which belongs to the three. On the other side, the case of *Saltoun v. Houstoun (a)* will be cited; but there, the deed stated expressly that an account of the debts of *Simon Fraser* the elder had been taken, and that the balance in his favour amounted to 38,000*l.*, and that it had been agreed between *S. F.* the elder, *S. F.* the younger and *J. H. Houstoun*, that the whole of the debts and credits of *S. F.* the elder should be received and paid by *S. F.* the younger and *J. H. H.* Here, on the contrary, the language of the recital negatives the implication of any agreement or covenant with Sir C. T. alone.

The second point is, that, supposing the covenant to erect to be with the lessor only, yet being a covenant to erect on part of the waste not demised, it is a covenant to do a thing merely collateral. This depends upon the second resolution in *Spencer's* case (*b*), where the rule is thus laid down:—"It was resolved, that in this case if the lessee had covenanted for him and his assigns, that they

(a) 1 Bingham 433.

(b) 5 Co. Rep. 16.

would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised that it should bind the assignee; for, although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it; and, therefore, shall bind the assignee by express words. So, on the other side, if a warranty be made to one, his heirs and assigns, by express words, the assignee shall take benefit of it, and shall have a warrantia chartæ. F. N. B. 135; and 9 *Edw. 2*, Garr. de Charters, 30; 36 *Edw. 3*. tit. Garr. 1 (a); 4 *Hen. 8*, Dyer, 1. But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch or concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assigns to build a house upon the land of the lessor, which is no parcel (*que n'est aucun parcel*) of the demise, or to pay any collateral sum to the lessor or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised or that is assigned over; and, therefore, in such case the assignee of the thing demised cannot be charged with it no more than any other stranger." (b).

This case is still stronger, because the supposed covenant is to erect a building on the land of the three. [Lord *Tenterden*, C. J. There is no express allegation that the waste on which the smelting-mill was to be erected was the land of the three.] It is either upon the land of the three or upon the land of a stranger. The resolution in *Spencer's* case determined, that where a covenant is collateral, the assignee of the lessee would not be bound; à fortiori, the lessee cannot be bound to a person who derives no advantage from the subject-matter of the covenant. What in-

(a) This reference should have been to 36 *Edw. 3*, tit. Garr. de Charters, pl. 11.

(b) 5 Co. Rep. 16, b.



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terest would the plaintiff have taken in the smelting-house, if erected? He would have had no right to the land on which it was built. There are several modern cases, the effect of which is to shew, that to bind the assignee, the covenant must be to do something on the land demised, or something beneficial to the land demised. In *Vyryan v. Arthur* (a), the plaintiff's devisor being seised in fee of a mill and lands, demised the latter to the defendant, paying rent and doing suit to the mill of the devisor, his heirs and assigns, by grinding &c., and afterwards devised the mill and lands to the plaintiff: it was held, that the suit was in the nature of rent, and that the implied covenant resulting from the *reddendum* ran with the land as long as the mill and the land belonged to the same person. That case was determined upon the circumstance of the mill and the land belonging to the same person; and upon this and other grounds it is distinguishable from the case now before the Court. In *Spencer's* case (b) it was held, that the statute of 32 *Hen.* 8, c. 34, which gives the assignee of the reversion the right to sue upon the covenants of the lessor, extends only to the thing demised, and not to that which is collateral (c). [Lord *Tenterden*, C.J. Nothing appears to have been assigned by Sir *Charles Turner* but the reversion of the demised premises.]

*Alderson*, *contra*. Upon the first point it is quite clear that this was a covenant to erect a new smelting-mill; *Hollis v. Carr* (d). Upon the second point, a smelting-mill is annexed *quodammodo*, it might almost be said *omnimodo*, to the thing demised; *Vernon v. Smith* (e), and *Bally v. Wells* (f), there cited. Here the covenant was to erect in

(a) 2 D. & R. 670; 1 B. & C. 410.

(b) 5 Co. Rep. 16, a.

(c) *Ibid.* 18, a. It appears to have been assumed throughout this argument, that any covenant which would run with the land at common law as against the assignee of

the lessee, would pass to the assignee of the lessor under 32 *Hen.* 8, c. 34: *tamen quære*.

(d) 2 Mod. 90.

(e) 5 B. & A. 1.

(f) *Wilmot's Notes*, 344; 3 Wils. 25.

lieu of that which was part of the thing demised. This was a smelting lease, in which the smelting-mill is *quodammodo* annexed to the mine; this amounts to a demise of a part of the wastes on which the lessee should erect a mill. Suppose a lean-to had been erected on the land adjoining the house, it would hardly be contended that such a building was not annexed to the house. By adopting the construction for which the plaintiff contends, the Court will carry into effect the intention of the parties. [*Parke, J.* Supposing, in the case you put, the lessor assigned to different parties, or retained part in his own hands, who at the end of the term would be entitled to the buildings? *Bayley, J.* Could the lessor have distrained in the new smelting-house?(a)] When erected, it would form part of the demised property.

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*Brodrick*, in reply. *Vernon v. Smith* (b) only establishes a point which was never denied. There, as well as in *Saltoun v. Houstoun* (c), the Court looked to the whole of the instrument. Here the agreement to build was with other persons. [Lord *Tenterden*, C. J. The old smelting-mill was taken down by the consent of Sir *Charles Turner* and the other two owners; the new smelting-mill would belong to the three.] Upon the second point, where *Bally v. Wells* was referred to, the distinction was, whether the act that was to be done was to be done on any part of the land demised. It is clear that the smelting-mill was not demised; the old mill had been taken down, and the new one was to be erected: it is not said "which should thereafter be erected." It does not touch or concern the thing demised. The inference would be, that the land on which the mill was built belonged in fee to the three; whatever interest they had, was not demised to the defendant, or conveyed to the plaintiff by a conveyance of the demised premises.

*Cur. adv. vult.*

(a) *Vide Buszard v. Copel*, ante, ii. 197. (b) *Suprà*, 424. (c) 1 Bingham 433.

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On a subsequent day in this term

Lord TENTERDEN, C. J. delivered the judgment of the Court. After stating the substance of the allegations of the declaration, his lordship proceeded thus:—By the parts of the deed set out in the declaration, it was evidently the intention of the parties that a new smelting-mill should be erected; and as no precise form of words is necessary to make a covenant, the recital of the agreement to erect a building, followed by express covenants to maintain the smelting-mill in repair, and to deliver it up at the end of the term, amounts to a covenant in law to erect. *Saltoun v. Houstoun* is directly in point. Here the erection of the building is mentioned in the recital of a prior agreement. It was further objected, that the prior agreement was not with the lessor only, and that consequently no covenant with him alone could be implied. But as he demises only a third, the agreement would enure as a separate contract with him in respect of his particular interest.

Upon the second question, it appears that Sir *Charles Turner* was seised in fee of an undivided third part of the mine, with the *appurtenances*; which word, in a large sense, reaches every thing connected with the subject-matter of the demise. It may be inferred that Sir *Charles Turner*, though not seised of the wastes, had a power to erect on them buildings requisite for the working of the mines, and that such buildings were his property. The building covenanted to be erected was to be used for mining purposes, was to be the property of the owners of the mines; as such it related to the mines, and to them only. It cannot be said, therefore, that the covenants relate to a matter collateral to and unconnected with the demised premises. The rule as to covenants passing to and binding assignees is laid down in *Spencer's case*, where it is said that a covenant to make a new wall upon some part of the thing demised shall bind the assignee. Covenants not binding the assignee are there said to be, for the doing of things

merely collateral to the land, and which do not touch or concern the thing demised in any sort. A covenant to build a house on other land of the lessor is mentioned by way of instance, and must therefore be understood of a house not touching or concerning the thing demised. Here the covenant tends, in the language of *Wilmot, C. J.*, in *Bally v. Wells* (a), to the support and maintenance of the thing demised, and therefore follows the reversion. The same language is used in *Shepherd's Touchstone* (b).

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#### Judgment for the plaintiffs (c).

(a) *Suprà*, 426.

(b) *Shep. Touchs.* 176.

(c) And see *Co. Lit.* 215, b.

*A.* conveys in fee to *B. & C.* to the use, that *A.* and his heirs may take to his and their use a rent to be issuing out of the premises; and, subject to the rent, to the use of *B.* and his heirs; and *B.* covenants with *A.* his heirs and assigns, to pay to *A.* his heirs and assigns rent, and to build within one year a messuage on the premises, for better securing the rent; and *A.* within one year de-

mises the rent to *D.* for 1000 years. *D.* cannot maintain covenant against *B.* for non-payment of the rent, or for not building the messuage, the covenant being in gross. *Milnes v. Branch*, 5 M. & S. 411.

As to what words of contract in a deed amount to a covenant, see *Com. Dig. Covenant, A. 2, 3. Holles v. Carr*, 3 Swanst. 647.

As to covenants implied by law, see *Com. Dig. Covenant, A. 4; Spencer's case*, 5 Co. Rep. 18, a.

#### OXENDALE v. WETHERELL.

**ASSUMPSIT** for wheat sold and delivered. At the trial before *Bayley, J.*, at the York spring assizes, 1829, it appeared that the plaintiff had delivered to the defendant 130 bushels of wheat; and the question upon the evidence was, whether the contract was for 250 bushels, or for so much as the plaintiff could spare; but the plaintiff contended, that inasmuch as the defendant had retained the portion which had been delivered, he was liable to pay the price of that portion, even supposing the contract to be entire. The learned Judge was of this opinion, and the jury having found an entire contract for 250 bushels, his

The seller of 250 bushels of wheat, to be delivered within a certain time, delivering 130 bushels only, which the purchaser accepts and retains after the expiration of the stipulated time of delivery, may recover the price of the part delivered.

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lordship directed a verdict to be entered for the plaintiff, giving leave to the defendant to move to enter a nonsuit.

*Brougham* now moved accordingly. *Walker v. Dixon* (a) is quite in point. There the plaintiff had contracted for the sale of 100 sacks of warranted flour, at 94s. 6d. per sack, ten sacks to be sent immediately on trial, to be accepted or rejected within two days. The ten sacks being sent, the defendant retained four, returning six as of inferior quality. Ten others were afterwards sent to a wharf for the defendant, who took away two, leaving the remainder, which the plaintiff afterwards took away. The defendant tendered the whole price of the 100 sacks, and required the residue to be delivered. The plaintiff refused to supply the remaining 94 sacks, and brought his action for the six which had been delivered. Lord *Ellenborough* was of opinion, that as the defendant was ready to perform the contract, and to pay for the whole the price agreed upon, the plaintiff could not afterwards split the contract, and bring his action for part, and the plaintiff was nonsuited. In *Waddington v. Oliver* (b), where the plaintiff had agreed to deliver 100 bags of hops, and having delivered part, commenced an action for the price before the expiration of the time for the delivery of the remainder, it was held that the contract was entire, and could not be split, and that the plaintiff had therefore no right to bring an action before the whole quantity was delivered, or until the time for the delivering of the whole had arrived.

Lord TENTERDEN, C. J.—In Manning's Digest (c), the Court are stated to have set aside the nonsuit in *Walker v. Dixon*, ex relatione *Wilde*, of counsel for the defendant. If the plaintiff had delivered all but one bushel, he would, according to the rule contended for, have been unable to recover the price of the 249 bushels, although the defendant had accepted and retained them.

(a) 2 Stark. N. P. C. 281. (b) 2 New Rep. 61 (c) 2d edition, 309.

BAYLEY, J.—The defendant retained the 130 bushels after the time for completing the delivery had expired.

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PARKE, J.—I always understood the distinction to be this: that where there is an entire contract for the purchase of distinct parcels of goods, to be delivered within a specified time, a vendor cannot, upon delivering part, bring an action for the price of that part before the time for the delivery of the remainder has expired; because the purchaser may return the part which he has received, if he cannot get the residue at the stipulated time. But if, notwithstanding the non-performance of part of the contract by the vendor, the purchaser retains the part which has been delivered, he is liable for the price of that part (a).

Rule refused.

(a) And see *Shipton v. Casson*, 3 D. & R. 130; 5 B. & C. 378.

The KING, on the prosecution of ELIZABETH WELLS,  
Spinster, v. WHATELY, clerk.

IN Hilary Term last, *Merewether*, Serjt., obtained a rule calling upon the defendant to shew cause why an information should not be exhibited against him for certain misdemeanors. This rule was granted upon affidavits stating, that the prosecutrix, now 74 years of age, had for 20 years and upwards been in the possession of a cottage and garden in the parish of Cookham, in the county of Berks, adjoining the vicarage house and glebe; that the defendant was vicar of Cookham, and a justice of the peace for Berkshire; Where shrubs are cut, upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the malicious trespass act, though the title to the spot on which the shrubs grew be in dispute between the parties.

Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him, the magistrate, on oath; whereas no oath had been taken, and the information had been communicated by the magistrate to the informer, the Court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs.

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that disputes had arisen between the prosecutrix and the defendant, respecting a small portion of land lying between their respective properties, which was described in the prosecutrix's title deeds from 1661 as part of her estate, was inclosed within her fences, and had always been enjoyed by her until 1823; that the defendant having claimed this portion of land as belonging to the vicarage, the prosecutrix proposed that such claim should be submitted to arbitration, and offered her title deeds for the defendant's inspection, both which were refused; that the defendant called on the prosecutrix in December, 1822, and told her that unless she would give up this piece of land, he would pull down the wall which separated it from the vicarage; that on the 4th March, 1823, the prosecutrix was served with a notice requiring her to give up to the defendant, at Michaelmas then next, possession of all the lands and premises she held at C. in the county of B. belonging to the vicar of C.; that the prosecutrix, having disregarded this notice, the defendant, in the latter part of 1823, threw down the wall and separated the portion in question from the residue of the prosecutrix's land by sticks and stakes, forming no fence; that on the 18th November, 1828, the prosecutrix, observing that the branches of an elder bush, which the defendant had planted on the portion of land in question, within six inches of a brick wall of the prosecutrix, were growing in such a manner as appeared to her to injure the wall, she cut off such branches with a pocket knife, which she happened to have about her; that the prosecutrix acted solely from an apprehension that the branches would injure the wall, which had fallen down twice within a short period; that on the 19th November, *Ward*, an attorney, called on the prosecutrix with the following note from the defendant:

"Madam, I send you herewith the malicious trespass act (*a*), requesting Mr. *Ward* to explain any part of it to

(*a*) 7 & 8 Geo. 4, c. 30, which provides, sect. 20, "That if any person shall unlawfully and mali-

ciously cut, break, bark, root up, or otherwise destroy or damage the whole, or any part of any tree

you with which you may be unacquainted. The course which I shall prescribe to myself will be to refer the present case to the bench at Maidenhead, and to require your attendance, together with the witnesses, there on Monday next at 12 o'clock, unless you wish me to determine the case immediately, which, you may observe, *I have the power to do*, in order to spare you the exposure of a public examination. I shall much prefer the common course mentioned above, viz. referring the matter to the bench at Maidenhead, but

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sapling, or shrub, or any under-wood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at least, every offender being convicted before a justice of the peace, shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding 5*l.* as to the justice shall seem meet; and if any person so convicted, shall afterwards be guilty of any of the said offences and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labour for such term not exceeding 12 calendar months, as the convicting justice shall think fit, and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to

any of the punishments which the court may award for the felony hereinbefore last mentioned."

By sect. 30, "For the more effectual prosecution of all offences punishable on summary conviction under this act," it is enacted, "that where any person, charged *on oath* of a credible witness, before any justice of the peace, with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly then (upon proof of the due service of the summons upon such person, by delivering the same to him personally or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him *before himself*, or some other justice of the peace; or the justice before whom the charge shall be made, may, (if he shall think fit) without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice before whom the person charged shall appear, or be brought, shall proceed to hear and determine the case."



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leave you to determine which should be adopted. I am,  
 Madam, your's, &c. *Thomas Whately.*"

That *Ward* stated and explained to the prosecutrix the great power vested in the magistrates by the act, which he read over to her, and advised the prosecutrix to compromise the matter, informing her, that if she desired to compromise, and would apologise for the offence which she had committed, the defendant was ready to accept the penalty, instead of summoning her to the justice meeting; that the prosecutrix rejected this proposal; that on the 21st November, 1828, the following summons was served on the prosecutrix:—

"Berkshire to wit: To the petty constable of the parish of Cookham, in the same county. Whereas *John Clark*, gardener to the Reverend *Thomas Whately*, of &c. clerk, hath this day made information and complaint upon oath before me, one of his majesty's justices of the peace in and for the said county, that *Elizabeth Wells*, of the parish of Cookham aforesaid, spinster, did unlawfully and maliciously cut and damage several trees and shrubs growing in a shrubbery in the parish of Cookham aforesaid, the property of the Reverend *Thomas Whately*, contrary to the form of the statute in that case made and provided: These are, therefore, to command you, in his said majesty's name, to summon the said *Elizabeth Wells* personally to appear before me, or such other of his majesty's justices of the peace for the said county as shall be present, at the Swan Inn, at Maidenhead in the said county, on Monday, the 24th day of November instant, at the hour of 11 in the forenoon of the same day, to answer unto the said complaint, and further to do and receive what to the law doth appertain. And be you then there to certify what you shall have done in execution thereof. Herein fail you not. Given under my hand and seal, the 19th day of November, in the year of our Lord, 1828. *Thomas Whately.* (L. S.)"

That on 24th November, when the prosecutrix's horses were at her door for the purpose of taking her to the justice

meeting, *Lee*, the attorney for the parish of Cookham, advised the prosecutrix to submit, and to accept the terms offered by defendant, viz. to pay the 5*l.* penalty, and make a substantial fence to inclose the said portion of land; that the prosecutrix not being aware of any connexion between *Lee* and the parish of Cookham, suffered herself to be persuaded by him to pay the 5*l.* to defendant; that on the 16th January, 1829, *Lee* addressed the following letter to the prosecutrix's attorney:—

“ Maidenhead, 16th January, 1829.

Sir,—My letter to Mrs. *Wells*, of 23d November last, will inform you of the reasons which induced me to advise her to avoid the public investigation of Mr. *Whately*'s charge against her. Having obtained her consent to endeavour to effect an arrangement or compromise of the matter, I waited on Mr. *Whately* with that view. He represented to me that a great number of shrubs had been cut by some person, along the whole line of the border, extending from Mrs. *Wells*'s fence towards Mr. *Whately*'s house. Although there was no proof that any other shrubs than the elder had been cut by Mrs. *Wells*, it appeared to me likely that the magistrates would be apt to presume, on proving Mrs. *Wells*'s admission respecting the elder tree, that she had cut the other shrubs also; especially as it seemed quite impossible that the elder tree could have been cut, unless by some person actually standing on Mr. *Whately*'s ground. Mr. *Whately* also stated, that he was in possession of some letters written by Mrs. *Wells* (if I recollect right, to Lady *Orkney*,) which he intended to produce to the magistrates, in order to shew that Mrs. *Wells* had long indulged an implacable spirit towards him. Under these circumstances, and knowing the difficulty I should have in confining Mr. *Whately* to what would be strictly admissible evidence, before the bench, I was very desirous to prevent the necessity of Mrs. *Wells*'s appearance in public. The only terms I could make with Mr. *Whately* were, that Mrs. *Wells* should pay 5*l.* to Mr. *Whately*, to be laid out in coals for the poor in the village,

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and that she should put up a fence of wooden paling at that end of the piece of Mr. *Whately's* ground, at which he supposed she entered. Mrs. *Wells* acceded to these terms, and paid the money. As no conviction took place, I should conceive it was in the nature of a compromise. This is all the information I can give you upon the subject.

I remain, &c., *John D. Lee."*

That *Clark*, the informant, stated that he did not see that the prosecutrix cut the trees or pulled them out, and could not say of his own knowledge that she did it, and that he never made any oath or gave information to the defendant, but on the contrary, received his information as to the circumstances from the defendant.

Cause was now shewn upon affidavits stating, that in 1797, a dispute having arisen between the defendant and *Hexter*, the then occupier of the prosecutrix's cottage, respecting another portion of land which the defendant wished to throw into the vicarage, the prosecutrix informed the defendant that he might compel *Hexter* to give up that portion of land, by threatening to take from him the parcel of land now in dispute; and referred defendant to an entry in the parish books, evidencing the right of the vicar to the parcel of land in question, and shewing that it was held under the vicar at 2s. 6d. rent; that after the prosecutrix became possessed of the cottage, she paid the defendant the rent of 2s. 6d. per annum for the parcel of land in question; that disputes having afterwards arisen between the defendant and the prosecutrix, as to the right to this parcel of land, the prosecutrix agreed to abandon her claim, and to sign an acknowledgment of the defendant's title as vicar, upon her being permitted to continue the occupation at the 2s. 6d. per annum; that the following instrument was then drawn up, and was signed by the prosecutrix.

" Extract from the old Register Book belonging to the parish of Cookham, Berks:—A memorandum made March the 20th, 1732, that Mrs. *Grace Goldsborough* rents of the

Rev. *Thomas Aley*n, vicar of Cookham, in the county of Berks, at the yearly rent of 2s. 6d., a piece of garden ground at the north end of the said Mrs. *Goldsborough's* garden, for the term of three years from Michaelmas last, containing, &c.; which piece of ground belongeth to the vicar of Cookham for the time being. To the above agreement I accede, *E. G. Wells*. 3d September, 1813."

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That the prosecutrix continued tenant to the defendant, paying said annual rent until 1823, when defendant, in consequence of certain malicious reports spread by the prosecutrix, and tending to injure the character of the defendant, purporting that the defendant had improperly wrested from her the said parcel of land, became dissatisfied with the prosecutrix, gave her notice to quit, and upon the expiration of that notice took possession; that the elder bush cut down on the 17th of November was of a rare and valuable species, *Sambucus racemosus* (a); that defendant sent Mr. *Ward* to the prosecutrix with the malicious trespass act, in order to put her fully on her guard, and afford her an opportunity of getting legal advice; that defendant did not authorise *Ward* to advise the prosecutrix to compromise; that defendant, being informed that *Lee* had been retained by the prosecutrix as her attorney with reference to the summons, and that it was his intention to request permission (b) of the magistrates to attend with her before them, wrote to *Lee* as follows:—

(a) *Quære*.

(b) It has never been determined, and probably never will be, that upon the hearing of cases which are subjected to the *final* decision of justices of the peace, they have any authority to exclude the public.

In *Cox v. Coleridge*, 2 D. & R. 86, and 1 B. & C. 37, it was held, that an attorney retained by a prisoner charged with felony, to give him advice and assistance during his examination before magistrates,

might be lawfully excluded, on the ground that it was *merely a preliminary inquiry*. The attention of the Court, however, in that case, does not appear to have been drawn to the statutes 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, the former of which provides, "that justices before whom such prisoner is brought for any manslaughter or *felony*, before any bailment or mainprize, (or by 2 & 3 Ph. & M. c. 10, where the prisoner is com-

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" Sunday morning, 23d.

Dear Sir,—I hasten to thank you for your note, and to assure you, as I did your uncle before you, that I am glad Miss *Wells* is in such good hands. Would that she possessed a little of your temper, and was guided by your spirit. As it is she is rushing wantonly upon a dreadful exposure. I have exercised, (as I shall shew,) an uniform forbearance, and would now, if she would allow me, spare her the disgrace to which she is hastening: but there is a point beyond which forbearance is a weakness. I must protect myself against malicious trespass; this protection is all I seek; and if this can be obtained in any milder way than bringing her before the magistrates, I shall be satisfied; for I have not the slightest feeling of ill will towards her.

I am, sir, your obedient servant,      *Thomas Whately.*  
 To *John D. Lee*, Esq. Attorney at law."

That on the morning of the 24th, when the defendant was about to set out for the justice meeting at Maidenhead, *Lee* called on the part of the prosecutrix, and expressed her regret for what had passed, and her readiness to make compensation for the damage; that *Lee* then proposed that the prosecutrix should pay 5*l.* for the use of the poor, and should restore the fence; to which proposal the defendant ac-

mitted,) shall take the examination of the said prisoner, and informations of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony, shall be put in writing, before they make the same bailment: which said examination, together with the said bailment, the justices shall certify at the next general gaol delivery to be holden within the limits of their commission." Under these statutes it has been held, that if the examinant die before the trial of the felony, his examination may be received

in evidence against the prisoner, on the ground that the prisoner has had the opportunity of cross-examining the examinant. Under the decision in *Cox v. Coleridge*, it would seem that a prisoner may be deprived of the means of cross-examining his accusers before the magistrate, on the ground that the investigation is merely in the nature of a precognition; and that when taking his trial for his life, he may be told, upon the production of the examination of a deceased witness, that his time for detecting the falsehood of the charge by cross-examination is gone by.

ceded; that *Clark*, when taken by the defendant to the spot where the elder bush had stood, observed and gave information to the defendant of other shrubs which had been cut; that *Clark* was informed by defendant that he was not on oath; that the summons was filled up from a printed form, and the words "on oath" were intended to be erased.

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Sir *J. Scarlett* and *Rogers* now shewed cause. After the distinct recognition by the prosecutrix of the defendant's title, it is clear that the right set up by the prosecutrix was a mere after-thought. It would have been useless to have resorted to arbitration, since the successor would not have been bound by any award.

*Merewether*, Serjt., and *Manning*, contra. The prosecutrix acted bonâ fide in the assertion of her claim to this property, and in the removal of what she considered to be injurious to the wall. The defendant states his belief that other shrubs were destroyed by the prosecutrix, but no facts are alleged to support his suspicions. As the prosecutrix had no opportunity of contradicting such surmises, so neither could she have anticipated them. Here the defendant had no jurisdiction, first, because the trespass was committed in the assertion of a right; secondly, because that statute requires an information *on oath*; and, thirdly, because he himself was a party, and could not be a judge in his own cause. The payment of the 5*l.*, which has been wrongfully obtained from the prosecutrix, will no doubt be used against her upon the trial of her title to the plot in question; whereas it would have been competent to her to remove any prejudice which might be thrown upon her title by the former arrangement between the parties, by shewing, as the fact is stated to be, that they referred to a different spot.

LORD TENTERDEN, C. J.—I am clearly of opinion that this rule ought to be discharged. The prosecutrix considered herself aggrieved by this land's having been taken from

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her. It appears that Mr. *Whately* had planted shrubs of a particular kind. It is conceded that the prosecutrix cut two of these shrubs; and there is every reason to suppose that she cut a great many more. I entertain no doubt that this was an act of malicious trespass, within the meaning of the act. The pretences set up by the prosecutrix are merely futile.

If nothing more had appeared, we ought to have made the prosecutrix pay the expenses which Mr. *Whately* has incurred in opposing this rule; but something appears which we cannot altogether approve of. Mr. *Whately* should have left it to other persons to have issued a summons. In that summons it is also inadvertently alleged that the information had been given on oath. In both these particulars Mr. *Whately* acted unadvisedly; and though we much disapprove of the conduct of the prosecutrix in destroying these shrubs, we think that we cannot give Mr. *Whately* his costs.

Rule discharged, without costs.

ANN ARCHER MANDERSTON v. WILLIAM ROBERTSON  
 and THOMAS REID.

A. and B. give a joint promissory note for 600*l.* to C. In an action by C. against A. and B., an account in which B., as between himself and C., gives credit for interest upon a sum of 600*l.*, is evidence to oust the statute of limitations (a).

THIS was an action of assumpsit, brought to recover the principal and interest alleged to be due on a promissory note dated the 9th day of July, 1817, and made by the defendants, whereby they promised to pay the plaintiff the sum of 600*l.* The declaration contained counts on the note, and the usual common counts for money lent, money paid, had and received, and money due upon an account stated. The defendant *Robertson* suffered judgment by default, and the defendant *Reid* pleaded the general issue, and the statute of limitations; upon which issues were joined. Upon the trial a verdict was found for the plaintiff

(a) And see 9 *Geo.* 4, cap. 14.

for 695*l.*, subject to the opinion of the Court on the following case.

On the 9th of July, 1817, the defendants signed the above-mentioned note, of which the following is a copy:—

“£600

London, July 9, 1817.

One day after date we promise to pay to Mrs. *Ann Archer Manderston*, at the Bank of Scotland in Edinburgh, the sum of six hundred pounds, value received.

*Wm. Robertson,*

*T. Reid.”*

The plaintiff proved the following account and letter sent by the defendant *Robertson* to the plaintiff, on the 1st day of June, 1825:—

Dr. *Mrs. Manderston* in account with *Wm. Robertson*. Cr.

| 1823.                      | £. s. d.   | 1823.                             | £. s. d.   |
|----------------------------|------------|-----------------------------------|------------|
| Aug. 11. To bank post bill | 15 0 0     | May 28. By balance                | 635 5 7    |
| Nov. 13. Do. . . . Do.     | 25 0 0     | Aug. 13. 2d qr. Pension           | 12 10 0    |
| 1824.                      |            | Nov. 13. 3d Do. . . . .           | 12 10 0    |
| Jan. 25. Bank note . . .   | 10 0 0     | 1824.                             |            |
| April 23. Do. . . . .      | 10 0 0     | Feb. 12. 4th Do. . . . .          | 12 10 0    |
| May 20. Do. . . . .        | 20 0 0     | May 12. 1st Do. 24 . .            | 12 10 0    |
| Nov. 29. Do. . . . .       | 20 0 0     | Aug. 11. 2d Do. . . . .           | 12 10 0    |
| 1825.                      |            | Nov. 11. 3d Do. . . . .           | 12 10 0    |
| May 23. Bank note 16,329   |            | 1825.                             |            |
| per Mr. W. Mather          | 10 0 0     | Feb. 10. 4th Do. . . . .          | 12 10 0    |
| 31. Bank note . . .        | 20 0 0     | May 31. Interest on 600 <i>l.</i> |            |
| Balance . . .              | 665 5 7    | from Jan. 1, 1823, to             |            |
|                            |            | this date, 5 per. cent.           | 72 10 0    |
|                            |            |                                   | £. 795 5 7 |
|                            | £. 795 5 7 |                                   |            |
|                            |            | Balance . . .                     | 665 5 7    |

My dearest Madam,

June 1, 1825.

I have been waiting for some days in expectation of again hearing from you relative to Mr. *Mather's* arrival at Hamilton. The fact of the matter is, I sent a letter by the *James Watt*, addressed to you and to the care of Mr. *Mather*. I went down with it myself to Blackwall, and went on board the steam vessel about eight o'clock, in hopes of seeing Mr. *M.*, and after waiting some time without this pleasure, I gave my letter into the hands of the

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captain, who promised to deliver it to Mr. *M.* immediately on his arrival on board. This letter inclosed a bank note for 10*l.* No. 16,329, which, notwithstanding my not hearing of its safe arrival, am in strong hopes such is the case. I now without further delay inclose Bank of England note, 8966, 20*l.*, and statement of account annexed up to the present time, and shall be glad to hear from you early, for two reasons, first, your own health, which I sincerely hope is now in good condition; secondly, to learn the fate of my letter per *James Watt*. I shall write you more fully after hearing from you, but do not wish to lose another post.


I have never had any communication from Mrs. *Baillie* on what we talked about, but am well convinced that, if not forgotten, nothing has offered to speak about. Your's,  
most sincerely and affectionately, *Wm. Robertson.*

Mrs. *P. Manderston*, Patrick Brae,  
by Hamilton, Lancashire."

The plaintiff also called a witness named *Archer*, her brother in law, who proved, that in the summer of the year 1826, he had conversed with *Reid* upon the subject of the note, when *Reid* said there was such a thing as the note, but that it was made so long ago, that he, *Reid*, had almost forgotten it, and at the same time requested witness to procure for him a copy of it. The witness also further stated, that afterwards he accordingly did procure for *Reid* a copy of the note, and that when he delivered such copy to *Reid*, *Reid* observed, that when the note was given, he was assured by *Robertson* that the money would never be called for.

The plaintiff also called another witness, who proved that the son of the defendant *Reid* sent him to the former witness *Archer*; that he afterwards saw *Reid*, and told him he had spoken to *Archer*, who was going to commence legal proceedings for the amount; but if he would put any proposition in writing, *Archer* would forward it to his sister; to which *Reid* said, he did not consider himself liable for the amount, and would do no such thing.

The question for the opinion of the Court is, whether the above-stated evidence was sufficient to take the case out of the statute of limitations as against *Reid*. If this Court shall be of an opinion that it was, the verdict is to stand; if the Court shall be of an opinion that the evidence was insufficient, a nonsuit is to be entered.

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*Platt*, for the plaintiff. Two questions present themselves for the consideration of the Court; first, whether that which has been done by *Reid* himself is sufficient to take the case out of the statute of limitations; secondly, whether the acts of *Robertson* are sufficient. The second point is the stronger. In *Perry v. Jackson* (a), Lord *Kenyon* says (b), "It is admitted that one partner may do several acts to bind the interests of all; he may release as well as create a debt; he may also, by his acknowledgment, take a case out of the statute of limitations." Persons who join in making promissory notes are co-partners quoad hoc. In *Whitcomb v. Whiting* (c) it was held, that the acknowledgment of one of several makers of a joint and several note, was binding in a separate action against any of the others. *Jackson v. Fairbank* (d) was a very strong case; for there it was held, that payment by the assignees of one of two makers of a promissory note, was sufficient to take the case out of the statute, in a separate action against the other maker. In *Pittam v. Foster* (e), which

(a) 4 T. R. 416.

(b) Ibid. 419.

(c) Dougl. 652. The ground of the judgment in that case is thus stated by Lord *Mansfield*: "Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner an admission by one is an admission by all." But with great submission it may be said, that payment by one operates as the discharge of all, not by reason of any

agency, but because payment, without reference to the manner in which it is effected, extinguishes the debt. If the effect of payment by one co-debtor in discharge of his companion stood on the ground of agency, a co-debtor might remain liable to the creditor after the latter had levied the whole amount by distress, or by execution.

(d) 2 H. Bla. 340.

(e) 2 D. & R. 363, and 1 B. & C. 248.

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will probably be cited on the other side, where an action was brought against *A.* and *B.*, and *C.* his wife, upon a note made by *A.* and *C.*, it was held, that an acknowledgment made by *A.* after the marriage, would not support a count upon a promise by *A.* and *C.* before the marriage; that turned upon the form of the pleading. So in *Bland v. Haslerig* (*a*), which was a joint action against four; and the verdict was, that one of the defendants undertook within six years, and the others not. The evidence there would have warranted the finding of a joint undertaking, but the replication was bad, because it did not support the promise in the declaration. In *Perham v. Raynal* (*b*) it was held, that an acknowledgment within six years by one joint maker would revive the debt against the other, who was only a surety. In *Wood v. Braddick* (*c*) it was held, that an admission by one partner after the dissolution of the partnership during which the debt arose, was sufficient to charge his co-partner. In *Burleigh v. Stott* (*d*), the payment of interest by *A.* on the joint and several note of *A.* and *B.*, was held to bind *B.*, though he was merely a surety. This appears to be the case here, from the statement that *Reid* was assured by *Robertson* that the money would never be called for. If the Court is of opinion that there is enough to take the case out of the statute as against *Robertson*, it amounts to a promise by him, and consequently by both.

*Adolphus*, contra. *Whitcomb v. Whiting* has certainly been recognised; but in *Brandon v. Wharton* (*e*), Lord *Ellenborough* says (*f*), that "that case was full of hardship, for this inconvenience may follow from it: suppose a person liable, jointly with 30 or 40 others, for a debt, he may have

(*a*) 2 Ventr. 151.

(*b*) 2 Bingh. 306.

(*c*) 1 Taunt. 104. The action was brought against the partner who had not made the acknowledgment alone; but there does not

appear to have been any plea in abatement.

(*d*) *Ante*, ii. 93; 8 B. & C. 36.

(*e*) 1 B. & A. 463.

(*f*) *Ibid.* 467.

actually paid it, may have had in his possession the document by which that payment was proved, but may have lost his receipt—then, though this was one of the very cases which the statute was passed to protect, he may still be bound, and his liability be revived by a random acknowledgment made by some one of the 30 or 40 others who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive him of the advantage given him of the statute by means of an implied acknowledgment.” [Bayley, J. In that case there was nothing to bind even the party himself.] So, in *Holme v. Green* (a), Lord Ellenborough says, “an acknowledgment, to bind a partner, ought to be clear and distinct; unless there be an express and unequivocal acknowledgment of an existing debt by one partner, it will not bind the other.” [Bayley, J. In that case a general payment was endeavoured to be applied to a joint note.] So here, there is nothing in the case to connect the promissory note with the account.

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*Platt*, in reply. The Court will not look to see whether the 600*l.* mentioned in the account must necessarily refer to the note. It is sufficient if the jury were warranted by the evidence in so referring it. [Parke, J. The question in the case is, whether the evidence was sufficient to take the case out of the statute as against *Reid*.] It was never doubted that the 600*l.* applied to the note. The only question was, whether it amounted to an acknowledgment which would bind *Reid*. The question is, whether it was sufficient as against *Reid*, assuming that it was sufficient as against *Robertson*. The judgment by default is a sufficient admission as against *Robertson*. [Bayley, J. That would be sufficient according to *Jackson v. Fairbank* (b). *Littledale, J.* *Robertson* was clearly liable upon the account stated.] The

(a) 1 Stark. N. P. C. 488.

(b) *Ante*, 443.

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jury were warranted in forming the conclusion that it was the same 600*l.*

LORD TENTERDEN, C. J.—If the account is to be considered as applicable to the promissory note, *Burleigh v. Stott* is quite in point. Then ought the 600*l.* to be so applied? To what else can it be applied? There was no evidence to show that *Robertson* was indebted to the plaintiff on any other account. If that point had been raised at nisi prius, the jury could not reasonably have formed any other conclusion. This case differs very materially from *Holme v. Green*. There *Green* and *Salter* were makers of a note payable to *Holme* or order, and *Wilson*. The proof to take the case out of the statute was, that the note was indorsed to *Holme* alone, and that *Salter* had paid money to the separate credit of *Holme*. But it did not appear that at the time this payment was made, *Salter* knew any thing of this indorsement to *Holme*, and unless he knew that *Holme* was the holder of the note, the payment could not have the effect contended for.

BAYLEY, J.—There must be such an acknowledgment as amounts to the promise laid in the declaration. The declaration here alleges a joint promise by the two defendants. What was done by *Reid*, is not sufficient to support the promise. *Robertson* was liable jointly and separately; then his acknowledgment is evidence of a promise by one of two joint debtors, and is, therefore, evidence of a promise by both. It appears that the note remained in the hands of the plaintiff. The Court cannot form so wild a presumption as to suppose that the 600*l.* was due upon some other account. It is rather a question of fact than of law.

LITLEDALE, J.—The only question is, whether the 600*l.* mentioned in the account is the 600*l.* in the note. In that case, I have no doubt, that the promise by *Robertson* to pay the money in the note binds *Reid*. It might be a

question after so long time had passed, whether the jury would presume the 600*l.* to be the same. It would rather appear that *Robertson* was the principal, and *Reid* the surety. If *Robertson* was the principal, he would be liable to pay interest. I cannot say that the jury were not warranted in drawing the conclusion; *Robertson* being liable, no doubt *Reid* was liable.

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PARKE, J.—It appears to be admitted, that there was sufficient to take the case out of the statute as against *Reid*. The only point meant to be left is the same as that which was decided in *Burleigh v. Stott*. In that decision I entirely concur. That case was stronger than the present. There is great good sense in what is said by Lord *Ellenborough*. I should have thought, that when upon the putting in of the account, it appeared that the 600*l.* formed part of a former balance of 635*l.* 5*s.* 7*d.* the plaintiff should have produced that former account. The present account is evidence of the liability of *Robertson* as a separate debtor. There might have been an arrangement in the nature of accord and satisfaction. It is difficult to say that an account can be submitted to a jury as evidence of a joint debt which might upon a different state of the record have been submitted as evidence of a sole promise.

#### Judgment for the plaintiff (a).

(a) In *Atkins v. Tredgold*, 3 D. & R. 200; 2 B. & C. 23, where the surviving maker of a joint and several note made a payment of interest ten years after the death of his co-debtor, it was held, that the debt was not revived as against the executors of the latter. In one of the reports of this case, *Bayley*, J. is stated to have said, "The case of *Whitcomb v. Whiting* is relied on. That is certainly a very strong case, and it may be questionable whether it does not go beyond proper legal limits. But

that case is distinguishable from the present in two particulars. *Here the statute appears to have attached before the payment was made by Robert Tredgold, and, therefore, John Tredgold being at that time protected, could not be subjected to any new obligation by the act of Robert.*" In the principal case, nearly eight years had elapsed, viz. from July, 1817, to June, 1825. And see *Willis v. Newham*, cor. *Bayley*, J., York Summer Assizes, 1829, Wilk. *Limitation of Actions*, 86.

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## FRICKS v. POOLE.

An affidavit to hold to bail, "for money paid, laid out and expended, and lent and advanced, by the plaintiff to the defendant, and at his request," is bad, for not distinctly shewing that the money paid, laid out and expended, was so paid, &c. to the use of the defendant, and at his request.

THE defendant was arrested upon an affidavit stating that he was indebted to the plaintiff in 20*l.* and upwards, *for money paid, laid out and expended, and lent and advanced, by the plaintiff to the defendant, and at his request.* Chitty obtained a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody upon filing common bail; against which

Comyn now shewed cause. The words "at his request" refer to the whole of the previous sentence, which forms one entire allegation. It would not be true that the defendant was indebted to the plaintiff, as sworn, for money paid, unless the money were paid to the defendant's use, and at his request; but a request in law without a request in fact would be sufficient.

Chitty, *contra*, was stopped by the Court.

LORD TENTERDEN, C. J.—An affidavit to hold to bail is conclusive, and cannot be traversed by the defendant. The Court is therefore bound to be very strict in requiring that the right to arrest shall distinctly appear upon the face of the affidavit. If we were to allow a departure from the established form, and to say that the defendant's liability to arrest might be made out by argument and inference, we might be introducing much carelessness (*a*).

BAYLEY, J.—The request does not necessarily apply to the money paid.

Rule absolute (*b*).

(*a*) And see his lordship's observations in *Macpherson v. Lovie*, 2 D. & R. 69, and 1 B. & C. 108; and those of Lord *Ellenborough*, in

*Taylor v. Forbes*, 11 East, 315, 316.

(*b*) See *Pitt v. New*, ante, iii. 129, and the notes there.

HARRY STOE MANN v. Sir EDWARD WILLIAM CAMPBELL RICHARD OWEN, Knight, WILLIAM HENRY WEBLEY PARRY, and NICHOLAS LOCKYER (a).

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**THIS** was a special case in an action of trespass, commenced in Michaelmas term, 1826. The declaration stated, that the defendants, on the 7th day of January, 1825, together with certain other persons, being then under the control and command of the defendants, with force and arms made an assault upon the plaintiff, imprisoned him, and caused and procured him to be kept and detained in prison there for three months. Special damage was alleged, having reference to the plaintiff's loss of rank &c. as a purser in his Majesty's navy.

The declaration contained two other counts, in each of which the same cause of action was differently stated. Damages 5000/.

In Hilary term, 1827, the defendants pleaded the general issue, not guilty, together with five other pleas, only the second and fourth of which appear material to be stated; but by the terms of the special case either party was at liberty to refer to the pleadings (b). The second plea stated, that the plaintiff was a person in, and belonging to, the fleet of our Lord the King, in actual service, and full pay, in the said fleet, to wit, an officer in and of his said Majesty's naval service, that is to say, a purser in his said Majesty's service; and as such officer and purser, was employed in his said Majesty's naval service as purser of a certain ship of war of his said Majesty, to wit, the ship *Perseus*; and that the said plaintiff being such officer and purser in such actual service and full pay as aforesaid, and so employed as aforesaid, before the said time when &c., to wit, on the day and year aforesaid, on board the said ship *Perseus*, the same then being within the jurisdiction of the

The fraudulent charging, by a purser, of stores which were never issued, and the making of false entries in the ship's books to cover such charges, are an offence punishable "according to the laws and customs in such cases used at sea," as amounting, under 22 Geo. 2, c. 33, s. 36, to "a crime not capital, committed by persons in the fleet, not before mentioned in the act, and for which no punishment is thereby directed to be inflicted."

(a) This and the following cases were argued before three Judges, sitting in the Bail Court, pursuant to the king's warrant, under 3 Geo.

4, c. 102.

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(b) This reservation appears unnecessary, as the Court would be bound to look at the record.

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Admiralty of England, to wit, in the River Thames, committed and was guilty of a certain offence and breach of his duty as such officer and purser as aforesaid, cognizable by a naval court-martial, to wit, of fraudulently and unlawfully charging 26 blankets against 26 supernumerary seamen, to whom none had been issued, and of making, in order to such fraudulent charge, certain false entries in a certain book of the said ship *Perseus*. The plea went on to state a complaint duly made to the Lords Commissioners of the Admiralty within three years after the committing of the said offence; their Lordships' order duly issued to assemble a court-martial, defendant *Owen* being president; the due summoning and assembling of the same; that defendants, with others, duly held the same, for the purpose of trying the plaintiff, on board his Majesty's ship *Prince Regent*, in the port of Chatham; that the court did duly try him for the said offence, and that having weighed and considered the evidence produced against the plaintiff, and his statement and evidence on his defence, the court was of opinion, that the charge of the said offence had been proved against the plaintiff, and, in consequence thereof, did adjudge him to be dismissed from his Majesty's service, and rendered incapable of ever serving as a purser in the navy of his Majesty, his heirs, and successors; that the defendants, with other members of the court-martial, did, within the Admiralty jurisdiction, to wit, in the said port, on board the said ship, cause the plaintiff to be taken into custody with no unnecessary violence, and to be detained on board the said ship during his trial, for the purpose of such trial; as they lawfully might for the cause aforesaid; which are the same supposed trespasses, &c.

The fourth plea was the same with the second, except that instead of averring the plaintiff to have committed the offence mentioned in the second plea, it merely alleged that complaint in writing had been duly made to the Admiralty of his having committed that offence.

The replication joined issue on the first plea; and as to all the other pleas, replied "de injuriâ."

At the adjourned sittings for London after Trinity Term, 1827, the cause came on to be tried at Guildhall, before Lord *Tenterden*, C. J., when all the facts stated in the fourth plea were proved; as were also the facts stated in the second plea, except the allegation that the plaintiff had committed the offence with which he was charged; and it was also proved to be the invariable practice in all naval courts-martial, for the party accused to be in custody during the trial. The plaintiff was nonsuited.

In Michaelmas Term last, Lord *Tenterden*, C. J. made an order, that instead of the nonsuit, a verdict should be entered for the defendants on the second and fourth issues, and for the plaintiff upon the other issues.

In Hilary Term following, a rule was granted, calling upon the defendants to shew cause why judgment should not be entered for the plaintiff, on the whole of the counts in the declaration, notwithstanding the verdict; which rule coming on to be heard, the Court suggested that the points in question in this cause should be made the subject-matter of a special case; and a rule for that purpose was thereupon made.

The naval article of war, namely, the 36th, mentioned in 22 Geo. 2, c. 33, and upon which the defendants principally relied, is as follows:—"All other crimes not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea."

The question for the opinion of the Court is, whether, under the circumstances above stated, the defendants are entitled to judgment? If the Court shall be of opinion that they are not, such order to be made herein as to the Court shall seem fit.

*Barnewall*, for the plaintiff. The whole question is,

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whether the plaintiff was charged with an offence for which, by the articles of war, he was liable to an imprisonment. This would be an indictable misdemeanour at common law. The 22 *Geo.* 2, c. 33, does not comprehend a purser. The material articles are 24, 33, and 36. The statute must be construed strictly, as it takes away the right of the party to be tried at common law. This is not an embezzlement within the 24th article. The crime imputed to the plaintiff is within the 33d article, but that article does not apply to the plaintiff, who was not a flag-officer, a commander, or a lieutenant. Then with regard to the 36th article, which is set out in the case, this was not a *crime*. It may be an indictable misdemeanour, but the term crime rather imports an offence of higher nature than a mere misdemeanour. The legislature meant to express a crime which might be capital. This article applies only to crimes which are not previously mentioned in the act, or for which no punishment is thereby directed to be inflicted; but the offence with which the plaintiff is charged is mentioned in the 33d article, though not as applying to a purser. [*Bayley, J.* With a view to this plaintiff, the offence is not mentioned in the previous parts of the act. The term purser enters into the consideration of the legislature. The 33d article does not seem to apply to cases punishable at common law as misdemeanours.]

*Maule, contra.* There is no reason why judgment should not follow the verdict upon the second and fourth pleas. At the trial, Lord *Tenterden* said that he entertained no doubt upon the subject. If the plaintiff was not triable by a court-martial, an offence in breach of naval discipline would be punishable. If the offence were committed at sea, there would be great difficulty in trying the plaintiff before any other tribunal. The jurisdiction of the Court of Admiralty, in cases of misdemeanour, is very doubtful. A case occurred some years ago, in which the prosecution was abandoned, because it was thought that there was no

remedy. It is true, that by a very late act the law has been altered in this respect; but the clause in question must be construed with reference to the state of the law at the time when the act passed. This is very clearly within the articles of war. It would be a strange thing if the plaintiff, a purser, was not within the articles of war. Upon looking at the general scope of the statute, it is evident that the intention was to provide a mode of trial for offences against the discipline of the navy. No term can be more general than "crime." [*Bayley, J.* We say *CRIMEN falsi*.] The party must be within the 36th article of war, unless he can shew that he came within one of the preceding articles. This article was meant to form a supplement. The intention must prevail.

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BAYLEY, J.—It has been rightly conceded, that the offence with which the plaintiff was charged was an indictable misdemeanour; and the question is, whether such a misdemeanour is within the 36th article of war, the words of which are, "all other crimes, not capital, committed by any person or persons in the fleet, which are not mentioned in this act, or for which no punishment is hereby directed to be inflicted, shall be punished according to the laws and customs in such cases used at sea." Clergy did not apply to offences committed on the high seas, and therefore the words "other crimes not capital," would be confined exclusively to misdemeanours. The general term is "crime;" the subdivision is, "crimes and misdemeanours." *Blackstone* says (a), "we are now arrived at the fourth and last branch of these Commentaries, which treats of public wrongs, or *crimes and misdemeanours*." He afterwards says, "we are now, therefore, lastly, to proceed to the consideration of public wrongs, or *crimes and misdemeanours*, with the means of their prevention and punishment. In the pursuit of which subject I shall consider, in the first place, the general nature of crimes and punishments; secondly, the persons capable of committing crimes; thirdly,

(a) 4 Bla. Comm. 1.

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their several degrees of guilt, as principals or accessories; fourthly, the several species of crimes, with the punishment annexed to each by the laws of England; fifthly, the means of preventing their perpetration; and sixthly, the method of inflicting those punishments, which the law has annexed to each several *crime and misdemeanour*.” (a) The next point relied on is, that the 36th article relates only to such crimes as are not mentioned in the act, and that the 33d article had already provided for fraudulent conduct. That article directs, that if any flag-officer, captain or commander, or lieutenant, belonging to the fleet, shall be convicted before a court-martial of behaving in a scandalous, infamous, cruel, oppressive, or fraudulent manner, unbecoming the character of an officer, he shall be dismissed from his Majesty’s service. This article speaks of officers only, and applies to such frauds only as are committed by persons of a particular description; and if it were held that the words “which are not mentioned in this act” exclude the offences mentioned in the 33d article, by whomsoever they may be committed, we should protect every private sailor from being punished for a misdemeanour, if that misdemeanour fell within any of the words used in the 33d article, as cruelty, &c. I am disposed to think that these words are to be read as if “that is” had been used instead of “and.”

LITLEDALE, J.—I am entirely of the same opinion. The offence is not within the 24th, 31st, or 33d article. Then the question arises, whether it is within the 36th. It appears to me that the word “crime” has the same force as “offence.” The proper definition of crime, is, that it is an offence punishable by law. It is also insisted that the charge comes within the 33d article, and that it is thereby excluded from the operation of the 36th. I think the 33d article is intended to apply not to crimes, but to conduct unbecoming the character of an officer.

(a) 4 Bla. Com. 1.

PARKE, J.—I think the offence charged against the plaintiff is within the 36th article. The 33d article applies, not to indictable offences, but to conduct unbecoming the character of an officer, committed by a captain, commander, or lieutenant. It appears to me, therefore, that the offence in question is not within the 33d article, and that being an offence not capital, it falls within the provisions of the 36th article.

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Judgment for the defendants.

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**ASSUMPSIT.** The first count of the declaration stated, that plaintiff, on &c., at &c., at request of defendant, bargained with defendant to sell to him, and defendant agreed to buy of plaintiff, a large quantity of timber, to wit, 229 feet of timber, lying and being in and upon certain lands of plaintiff, at a certain price, to wit, the price of 1s. 6d. for each and every foot thereof, to be fetched and carried away by defendant from the said lands of plaintiff, and to be paid for by defendant, at the price aforesaid, within a reasonable time then next following; and in consideration thereof, and that plaintiff, at like request of defendant, had promised defendant to permit defendant to fetch and carry away the said timber from the said lands of plaintiff, defendant promised plaintiff to fetch and carry away the said timber from the said lands of plaintiff, and to pay plaintiff for the same, at the price aforesaid, within a reasonable time. Breach, that defendant refused to fetch and carry away the timber, or to pay for the same. Counts, for goods sold and delivered, and for goods bargained and sold. Plea, non

*A.*, by parol, sold to *B.* the timber of certain growing trees, at a price exceeding 10*L.* *B.* gave directions for cutting the trees, and offered to sell the butts to *C.* *A.*, by letter, required *B.* to pay for the timber. *B.*, by letter, answered that he had bought the timber, but that it was conditioned to be sound, and was not so. In assumpsit for the price of the timber:—Held, first, that there was no contract for the sale of land, or any interest in land, within the fourth section of the Statute of Frauds, (29 *Car.* 2, c. 3.) Secondly, that there was a contract for the sale of goods within the seventeenth section. Thirdly, that the letters did not constitute a note in writing of the contract, because they varied in their description of the terms of the contract. And, fourthly, that there was no part-acceptance, or actual receipt, of the goods by the buyer.

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assumpsit; and issue thereon. At the trial before *Vaughan*, B., at the Worcestershire summer assizes, 1828, the case was this: The plaintiff had given orders to have some ash trees cut down in a coppice, of which he was the proprietor; and the defendant, while the trees were being cut, and after two of them had been actually felled, came to the coppice, and the plaintiff pointed out to him the trees, which were numbered. The defendant, after looking at the trees, said to one of the by-standers that he had made a good bargain, and told one of the persons who were cutting them to tell the other men to cross-cut them fair; and they were cut accordingly. The defendant afterwards stated that he had bought only 10 trees, (instead of 14, for which the action was brought,) and that the reason he did not take them was, that they were unsound. The trees, upon being cut, measured 229 feet 7 inches. The defendant afterwards saw the person who had measured them, and offered to sell him the butts, which, he said, he had bought of the plaintiff; but this not being acceded to, the defendant asked him if he knew any person who wanted any butts; adding, that he would go to the plaintiff, and convert the tops into building-stuff. The defendant not having taken the timber away, the plaintiff's attorney sent him the following letter:

"Sir,—I am directed by Mr. *Smith*, of Norton Hall, to request you will forthwith pay for the ash timber which you purchased of him. The trees are numbered from 1 to 14, and contain, upon a very fair admeasurement, 229 feet 7 inches. The value, at 1s. 6d. per foot, amounts to 17l. 3s. 6d. I understand your objection to complete your contract is on the ground that the timber is faulty and unsound; but there is sufficient evidence to shew that the same timber is very kind and superior, and a superior marketable article. I understand you object to the manner in which the trees were cross-cut, but there is also evidence to prove that they were so cut by your direction. Unless the debt is immediately discharged, I have instructions to commence an action against you."

The defendant answered as follows:—

“ Sir,—I have this moment received a letter from you respecting Mr. *Smith's* timber, which I bought of him at 1s. 6d. per foot, to be sound and good, which I have some doubts whether it is or not; but he promised to make it so, and now denies it. When I saw him he told me I should not have any without all; so we agreed on those terms, and I expected him to sell it to somebody else.”

Upon this state of facts it was contended, on the part of the defendant, that the contract was one for the sale of growing trees, and therefore for the sale of an interest in land, within the principle laid down in *Scorell v. Boxall* (a); or, that if it was a contract for the sale of goods, wares and merchandises, still, the price being 10*l.* and upwards, and there being no note or memorandum in writing of the contract, the action was not maintainable. The learned Judge inclined to the opinion that the contract was one for the sale of goods only, and that the correspondence between the defendant and the plaintiff's attorney furnished a sufficient memorandum to take the case out of the operation of the Statute of Frauds. His lordship, therefore, directed the jury to find a verdict for the plaintiff for 17*l.* 3*s.* 6*d.*, but gave the defendant permission to move to enter a non-suit. A rule nisi having been obtained accordingly,

*Russell*, Serjt., and *Shutt*, now shewed cause. There is no ground for setting aside the verdict in this case. First, this was not a “contract or sale of lands, tenements or hereditaments, or any interest in or concerning them,” within the meaning of the fourth section of the Statute of Frauds. The trees were in the course of being felled at the time when the bargain was in progress, and two of them were actually felled before the bargain was completed. The contract therefore was, not for growing trees, but for the produce of growing trees, namely, timber; for *timber* does not, properly speaking, mean growing trees, but that

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(a) 1 Y. & J. 396.



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portion of the trees which, when felled, makes wood fit for building and manufacturing purposes. *Scorell v. Boxall* (a) has no application to the present case. That was an action of trespass brought by the purchaser of underwood, then standing, to be cut by him; and the question was, whether the plaintiff, having purchased by parol only, had such a possession as would enable him to maintain trespass against the defendant for cutting and carrying away the underwood. The Court of Exchequer were of opinion that he had not; that the contract was for the sale of an interest in land, and therefore that it ought to have been in writing in order to pass any interest to the purchaser. Here the contract was not for the sale of any interest in land, but for the sale of the timber which would be produced from the trees when they should be severed from the freehold. The defendant in this case could not have entered upon the land for the purpose of felling the trees without being a trespasser; and that is the true test by which to try whether the trees themselves were sold as growing trees, or that only which they would produce when felled, namely, the timber. If the word *timber* is construed as denoting trees only when severed from the freehold, that will reconcile the modern cases with the opinions expressed by *Treby, C. J.*, and *Powell, J.*, in 1 *Ld. Raymond*, 182 (b), namely, that a sale of timber growing upon the land may be by parol, because it is but a bare chattel. That opinion is cited as an authority in *Buller's Nisi Prius* (c), and is referred to by *Holroyd, J.*, without disapprobation, in *Mayfield v. Wadsley*, where it was held, that the plaintiff might recover upon a parol contract for the sale of crops of growing wheat (d). The mere circumstance of corn or trees existing in the soil in a growing state at the date of a contract for their sale, will not constitute them an interest in the soil. They may or may not be an interest in the land, according to circumstances; and the question whether they are so or not, will depend upon

(a) 1 Y. & J. 396.

(c) P. 282.

(b) *Littlewood v. Smith*.

(d) 5 D. & R. 224; 3 B. & C. 357.

the nature of the agreement made between the parties, and the rights which that agreement confers upon the purchaser. If it give him an exclusive right to the land for a term, for the purpose of making a profit of the growing surface, that will constitute an interest in the land. *Crosby v. Wadsworth* (a) was a case of that description; for there the purchaser of a growing crop of grass was, by the terms of the contract, to mow the grass and make it into hay; therefore he was entitled to the possession of the land for that purpose, and might have maintained trespass against any person entering upon the land and taking the grass. In *Emmerson v. Heelis* (b), where a sale of growing turnips was held a sale of an interest in land, no time was stipulated for their removal, and the degree of their maturity was not precisely ascertained; and in *Evans v. Roberts* (c), *Bayley, J.* stated, that "he thought that in that case the growing turnips, at the time of the contract, were chattels" (d). In *Parker v. Staniland* (e) it was held, that a contract by the owner of a close cropped with potatoes, made on the 21st of November, to sell them at so much per sack, the buyer to get them out of the ground immediately, was not a contract for any interest in land, but was the same as if the potatoes had been sold in a warehouse, from whence they were to be removed by the buyer. And there Lord *Ellenborough* said, "the liberty which the defendant had, of entering the close for the purpose of taking the crop, amounted to an easement, and nothing more. No interest in the land itself passed, or was intended to pass, by the contract. The defendant could not have maintained ejectment to recover possession of the crop. In this respect this case differed materially from that of *Crosby v. Wadsworth* (f), which he was not disposed to extend." The same principle was recognised in the case of *Warwick v.*

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(a) 6 East, 602; 2 Smith, 559.

(b) 2 Taunt. 38.

(c) 8 D. &amp; R. 611; 5 B. &amp; C. 829.

(d) 5 B. &amp; C. 835.

(e) 11 East, 362.

(f) 6 East, 602; 2 Smith, 559.

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*Bruce* (a), where the same learned Judge observed, "if this had been a contract conferring an exclusive right to the land for a time, for the purpose of making a profit of the growing surface, it would be a contract for the sale of an interest in or concerning lands, and would then fall unquestionably within the range of *Crosby v. Wadsworth* (b). But here is a contract for the sale of potatoes at so much per acre; the potatoes are the subject-matter of sale; and whether at the time of sale they were covered with earth in the field, or in a box, still it was a sale of a mere chattel." All the authorities upon the subject were reviewed in the late case of *Evans v. Roberts* (c), where it was held, that a parol agreement made on the 25th of September for the sale of a then growing cover of potatoes, to be dug by the vendor, and carried by the vendee, when at maturity, was not a contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, within the meaning of the fourth section of the Statute of Frauds.

Secondly, this was not a "contract for the sale of goods, wares, or merchandises, for the price of 10*l.* and upwards," requiring either a part-acceptance, or a memorandum in writing of the bargain, within the meaning of the seventeenth section of the Statute of Frauds. The words of that clause cannot properly be extended to a sale of timber to be afterwards felled, or then in a course of being felled. This was an executory contract, for timber to be produced out of trees upon which work and labour was to be performed by the vendor for the benefit of the vendee. Something remained to be done by the seller, in order to give to the subject-matter of the contract that specific character in which alone it was, by the terms of the contract, to be taken away by the buyer. The contract, therefore, was one, not for goods, wares, and merchandises sold, but for work, labour, and materials found and provided. Upon this

(a) 2 M. & S. 205.

(c) 8 D. & R. 611; 5 B. & C. 829.

(b) 6 East, 602; 2 Smith, 559.

point they cited *Towers v. Osborne* (a), *Clayton v. Andrews* (b), and *Groves v. Buck* (c).

But, thirdly, even if this were a contract for the sale of goods, wares, and merchandises within the statute, there was a sufficient part-acceptance of the goods sold, and a sufficient note in writing of the bargain, to take the case out of the statute. The defendant dealt with the timber as if it were actually in his possession; and it has been held, that where the purchaser of goods so deals with them, he thereby supersedes the necessity of proving an actual delivery and acceptance: *Chaplin v. Rogers* (d), *Elmore v. Stone* (e), *Phillimore v. Barry* (f). [Bayley, J. What evidence was there of the defendant's dealing with the timber? In what way did he deal with it?] He spoke of it as his own; he said he had made a good bargain; he gave directions respecting the cross-cutting; and he offered to sell the butts. That amounted to a dealing with the timber as his own, like the case of *Blenkinsop v. Clayton* (g), where a person having bargained for a horse then in the stable, afterwards brought in a third person, told him that he had purchased it, and offered to sell it to him for a profit of 5*l*. [Bayley, J. The evidence was stronger there than it is here; and yet there, all that the Court decided was, that there was evidence to go to the jury upon the question of acceptance or non-acceptance. Parke, J. Is not *Tempest v. Fitzgerald* (h) an authority against you upon this point? Had not the plaintiff in this case a lien upon the timber for the price? If he had, that shews there had been no delivery and acceptance. That is one mode of trying the question.] At any rate there was a sufficient note in writing of the bargain. It is clear that two distinct written instruments may be coupled together, so as to constitute a memorandum of a contract, to satisfy the statute: *Jackson*

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(a) 1 Stra. 506.

(b) 4 Burr. 2101.

(c) 3 M. &amp; S. 178.

(d) 1 East, 192.

(e) 1 Taunt. 458.

(f) 1 Campb. 513.

(g) 7 Taunt. 597; 1 Moore, 328.

(h) 3 B. &amp; A. 680.

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*v. Lowe (a), Saunderson v. Jackson (b), Schneider v. Norris (c), Grant v. Fletcher (d).* So coupled, the letter of the plaintiff's attorney to the defendant, and the defendant's answer, constitute a sufficient memorandum of the contract. The former contains an assertion of the contract, with a statement of the quantity, quality and price of the timber, and the latter admits and confirms it. [*Bayley, J.* It admits the contract, the quantity, and the price, but denies the quality; therefore the two papers do not agree, and cannot be coupled together: *Richards v. Porter (e).*] There the letter of the purchaser falsified the contract itself, for it stated that the hops had not been sent at the time stipulated by the contract: besides, it contained a distinct refusal to accept the hops.

*Jervis*, contra, was stopped by the Court.

BAYLEY, J.—I am of opinion that the bargain in this case was not a contract for the sale of any lands, tenements or hereditaments, or any interest in or concerning them, within the meaning of the fourth section of the Statute of Frauds. The contract was not for the growing trees, but for the timber, at so much per foot; that is to say, the produce of the trees when they should be cut down and severed from the freehold. Then, three points have been made upon the seventeenth section of the statute. First, it was said that this was a mixed contract for goods and chattels, and for work and labour to be bestowed and performed by the plaintiff for the defendant. I think the true construction of the bargain is, that it is a contract for the future sale of the timber when it should be in a fit state for delivery. The vendor, in felling the timber and preparing it for delivery, was, in my opinion, doing work for himself,

(a) 7 Moore, 219; 1 Bingh. 9.

(b) 2 B. & P. 238.

(c) 2 M. & S. 286.

(d) 8 D. & R. 59; 5 B. & C.

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(e) 6 B. & C. 437.

and not for the vendee. *Garbutt v. Watson*(a) is an express authority upon this point. There the plaintiffs, who were millers, contracted with the defendant, a corn merchant, for the sale of 100 sacks of flour, at 50s. per sack, "to be prepared and shipped" within three weeks. There was no memorandum in writing of the contract. The flour was not at that time prepared; and it was held that that was a contract for the sale of goods, wares, and merchandises, within the meaning of the seventeenth section of the statute. Upon the authority of that case, I think that this is a contract for the sale of goods, wares, and merchandises, within the meaning of the seventeenth section of the statute, and that there ought to have been a note or memorandum of it in writing, or a part-acceptance, earnest, or part payment. Then it was said that the defendant had recognised in writing the contract stated in the letter of the plaintiff's attorney. I agree that if there had been a letter written by the vendor or his agent to the purchaser, specifying the terms of a contract, and the purchaser in his answer had recognised *that* contract, there would have been a note in writing of the bargain, sufficient to satisfy the statute. But the defendant in this case did not in his answer recognise the contract stated in the letter of the plaintiff's attorney. The two letters vary essentially in their description of the contract, in respect of the quality of the goods to be sold. The letter of the plaintiff's attorney speaks of the contract as one for the absolute purchase of timber at 1s. 6d. per foot, without reference to quality; whereas the defendant, in his answer, says, that it was part of the contract that the timber should be sound and good, that Mr. *Smith* denied it, and refused to let him have any without all, and that he expected him to sell it to somebody else. It is clear, therefore, that the vendee did not consider it a binding bargain, and did not intend to make it so. What the terms of the contract really were, is left in doubt by the letters, and must be ascertained by verbal testimony. Now that is

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precisely what it was the object of the statute to prevent; for it was intended that the note in writing should exclude all doubt as to the terms of the contract; which is not done by the defendant's letter. I am therefore of opinion that there was no note in writing of the contract sufficient to satisfy the statute. It was next contended, on the part of the plaintiff, that there had been an acceptance and actual receipt by the defendant of part of the property sold, so as to bring the case within the exception in the seventeenth section. I think there was no such acceptance or actual receipt, nor any thing equivalent to it. In all the cases cited there was something equivalent to an acceptance. In *Chaplin v. Rogers* (a) the vendee actually sold the hay again; and the jury from thence drew the conclusion that there had been an actual acceptance. In *Elmore v. Stone* (b) the horses were purchased of a horse dealer, who was also a livery stable keeper. The buyer directed the seller to keep the horses at livery; and they were removed from the place of sale to the livery stable. The buyer became liable to the livery stable keeper for the keep; which could not have been the case unless the horses had been supposed to have passed into his possession. The direction given by the vendee was considered equivalent to an acceptance or actual receipt by him of the horses. The vendor was converted into the agent of the purchaser for the purpose of keeping the horses; and they might fairly be considered as much in the possession of the purchaser as if they had been transferred to his own stable. For these reasons I am of opinion, that in this case there was no contract for the sale of an interest in land, within the meaning of the fourth section of the statute, but that there was a contract for the sale of goods, wares, and merchandises, within the meaning of the seventeenth section; that the letters did not constitute a sufficient note in writing of the bargain; and that there was no part-acceptance of the goods sold, so as to dispense with such a note. It follows that the action is

(a) 1 East, 194.

(b) 1 Taunt. 458.

not maintainable, and that the rule for entering a nonsuit must be made absolute.

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LITLEDALE, J.—I am of the same opinion. The object of the legislature in passing the Statute of Frauds is stated in the preamble, to be “for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury;” and for the purpose of effecting that object, it requires that the terms of contracts shall be reduced into writing, or that some other requisite shall be complied with, to shew manifestly that the contract has been completed. I infer from the preamble of the statute that the legislature intended to include, within some of its sections, the subject-matter of *all* contracts; and the various contracts enumerated in the succeeding sections seem to warrant the same inference. The first section enacts, that parol leases shall have the effect of leases at will only. The second section excepts out of the first, leases not exceeding the term of three years, where the rent reserved during the term amounts to two-thirds of the improved value. The third section enacts, that no leases, whether of freehold or terms of years, shall be assigned, granted, or surrendered, unless by deed, or note in writing. The first three sections apply to contracts which, before the passing of the statute, were usually, though not necessarily, under seal. The fourth section applies to those verbal promises or agreements which, before the passing of the statute, were probably, in most instances, reduced into writing, though not necessarily so. That section enacts, that no action shall be brought in the cases specified, unless the agreement, or some memorandum or note thereof, shall be in writing. The agreements specified are, a special promise by an executor or administrator to answer damages out of his own estate; a special promise to answer for the debt of another person; an agreement made in consideration of marriage; a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning



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them; and an agreement not to be performed within the space of one year from the making thereof. Such contracts, from their very special nature and subject-matter, would probably have been reduced into writing; but this section expressly requires that they shall be so. The fifth and sixth sections apply to devises of lands. The seventh, eighth, ninth, tenth, and eleventh sections apply to declarations of trusts; which are also required to be in writing. The twelfth section makes estates *pur autre vie* devisable. The thirteenth, fourteenth, fifteenth, and sixteenth sections apply to judgments and executions. I mention these only cursorily. Then comes the seventeenth section, which enacts, that no contract for the sale of any goods, wares or merchandises, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or that some note or memorandum in writing of the bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorised. Now, looking at the object of the statute as disclosed by the preamble, I infer that it was the intention of the legislature to embrace within the fourth and seventeenth sections the subject-matter of every verbal contract, the uncertainty in the terms of which was likely to lead to perjury or subornation of perjury. A contract for mere work and labour is not expressly mentioned in those sections, and may therefore not be within the statute; but where the contracting parties contemplate a sale of goods, although the subject-matter, at the time of making the contract, may not exist as goods, but is to be wrought into that state by the vendor's bestowing work and labour upon his raw materials: that, in my opinion, is a case within the statute. It appears to me to be sufficient, if, at the time of the completion of the contract, the subject-matter be goods, wares, and merchandises. I cannot, therefore, for one, subscribe to the doctrine of any case in which it has been decided that such a

contract is not within the statute. Applying this my view of the different sections to the present case, I think that this contract was not a contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning the same, within the meaning of the fourth section. The words in that section relate to contracts, whether for the sale of the fee-simple or of some interest less than the fee, which would give the vendee a right to the use of the land for a given time. In this case, even if the contract had been for the sale of the trees, with specific liberty to the vendee to enter upon the land and cut them, I think it would not have given him an interest in the land within the meaning of the statute. The object of a person selling timber is to pass to his vendee the property in the trees when they become goods and chattels, and not to give him an interest in his land. In this case the seller was to cut the trees; and his intention clearly was, not to give the buyer any property in the trees until they had been cut, and had ceased to be part of the freehold. For these reasons I am of opinion that the present is not a contract for the sale of any interest in lands. Assuming this to be so, then arises the question whether the case is not within the seventeenth section of the statute. It was formerly held, that where the goods which formed the subject-matter of the sale were not to be delivered till a future day, as one of the three requisites of that section, namely, a part-acceptance, could not possibly be complied with at the time of the contract, the case was not within the section. Later authorities, however, have established that such a contract is within the section, whether the goods are to be delivered immediately or not. These cases, therefore, have established, that where two of the requisites of the seventeenth section can, at the time of the contract, be carried into effect, the case is within it, although one of those requisites cannot then be carried into effect. There is another class of cases, where the article contracted for has not existed at the time of the contract, but was to be produced

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by work and labour to be performed by the vendor; as, for instance, *Groves v. Buck* (a), where the contract was for oak pins not then made, but to be cut out of slabs; and *Towers v. Osborne* (b), where the contract was for a chariot to be built. In such cases, undoubtedly, the contract has been considered rather as a contract for work and labour than for the sale of goods, wares, and merchandises, and has been held not to be within the statute. The impression upon my mind, however, is, that wherever the subject-matter, at the time of completing the contract, is goods, wares, and merchandises, this section of the statute applies, although it has become goods, wares and merchandises between the time of making and that of completing the contract, either by one of the parties bestowing his work and labour upon his own materials, or by his converting a portion of his own freehold into goods and chattels. It appears to me of even greater importance that the provisions of the statute should apply where the contract is executory, than where it is to be executed immediately. The uncertainty in the terms of executory contracts is especially calculated to give rise to disputes, and consequently to the perjury which it was the object of the statute to prevent. In the case of the chariot, for instance, a dispute might have arisen at any time before its completion, about the materials of which it was to be framed, or the colour in which it was to be painted; and then it would have become necessary to resort to parol evidence of the terms of the contract, which evidence it was the avowed and chief object of the statute to exclude. I am therefore of opinion that the contract in this case was a contract for the sale of goods, wares, and merchandises, within the operation of the seventeenth section. Assuming it to be such a contract, I am also of opinion that there was no sufficient note in writing of it. The correspondence between the plaintiff's attorney and the defendant cannot be considered as amounting to such a note in writing. Not only did it take

(a) 3 M. & S. 178.

(b) 1 Stra. 506.

place after the time for the performance of the contract had expired, but the two letters do not agree as to the terms of the contract. The letter of the plaintiff's attorney speaks of it as a contract for the sale of so much timber, at so much per foot, without any reference to quality. The defendant's letter states that it was a contract with a condition that the timber should be sound and good, though the plaintiff had subsequently denied that that was one of the terms of the contract. And, for the reasons stated by my brother *Bayley*, which I need not repeat, I think that there was no acceptance of the goods sold, so as to dispense with a note in writing altogether, according to the exception in that part of the statute. I agree, therefore, that the present rule for entering a nonsuit ought to be made absolute.

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PARKE, J.—I concur in opinion with the rest of the Court. The defendant could take no interest in the land by this contract, because he could not acquire any property in the trees till they were cut. The contract was clearly for the sale of goods, wares, and merchandises, within the seventeenth section of the statute. It was certainly held in *Groves v. Buck* (a), that the statute did not apply to a sale of goods, which at the time of the contract were not capable of delivery and acceptance; but that case was overruled by *Garbutt v. Watson* (b). There it was held, that a contract for the sale of a quantity of flour which, at the time of the contract, was not prepared, or in a state capable of immediate delivery, was, substantially, a contract for the sale of flour, and not a contract for work and labour, and materials found and provided. The true criterion in such cases is, whether the contract is substantially a contract for the sale of goods, or for work and labour, and materials found. Here the contract was substantially for the sale of goods, namely, timber, at so much per foot. Then assuming that there was a contract for the sale of

(a) 3 M. & S. 178.

(b) 1 D. & R. 219; 5 B. & A. 613.

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goods within the seventeenth section, the next question is, whether there was any note or memorandum in writing of that contract. The two letters do not, in my opinion, amount to a note in writing of the contract, because the contract stated by the plaintiff's attorney is not adopted by the defendant. On the contrary, it is evident that the defendant refused to assent to the contract stated on the part of the plaintiff. The only remaining question is, whether there has been a part-acceptance of the goods sold, and an actual receipt of the same, by the buyer. In the older cases I think the Court cannot have adverted to the words of the statute, for it seems to me impossible to reconcile those decisions with those words. But in the later cases of *Howe v. Palmer* (a), *Tempest v. Fitzgerald* (b), *Hanson v. Armitage* (c), and *Carter v. Toussaint* (d), it has been decided, that unless there has been such a mode of dealing on the part of the buyer as deprives him of all right to object to the quantity or quality of the goods, or deprives the seller of his right of lien, there cannot be any part-acceptance. Here there was nothing to shew that the seller had lost his lien for the price, or that the buyer had lost his right to object to the quality. For these reasons I concur in opinion that a nonsuit must be entered.

Rule absolute to enter a nonsuit.

(a) 3 B. & A. 321.

(c) 1 D. & R. 128; 5 B. & A. 559.

(b) 3 B. & A. 680.

(d) 1 D. & R. 515; 5 B. & A. 855.

## The KING v. WILLIAM WILLIAMS.

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THIS was an indictment, under the statute 21 Jac. 1, c. 15 (a), for a forcible entry, alleging that the prosecutor, *William Lewis*, was interested in the premises for a term of years unexpired at the time of the offence committed, and concluding "against the form of the statute." At the trial before *Vaughan, B.*, at the summer assizes for the county of Monmouth, 1828, *Lewis*, the prosecutor and the party dispossessed, was produced as a witness on the part of the prosecution. It was objected that he was incompetent, upon the ground that he had a direct interest in procuring a conviction, which would entitle him to judgment of restitution. The learned judge received the evidence, though not without doubts of its admissibility, and reserved the point. The evidence was material. The counsel for the defendant then tendered evidence to shew that the lease under which *Lewis* had entered into possession of the premises was invalid. This evidence the learned judge rejected, being of opinion that it was immaterial what estate the prosecutor had in the premises, the question not being one of title (c). The defendant was convicted. In Michaelmas term last,

Upon the trial of an indictment for a forcible entry, or detainer, under 8 H. 6, c. 9, or 21 J. 1, c. 15, the party dispossessed is not a competent witness for the prosecution.

Nor is it competent to the defendant to impeach the title of the party dispossessed.

Where such an indictment is brought before K. B. by certiorari, that Court is bound, upon conviction (b), to award restitution.

(a) Which enacts, "that such judges, justices, or justice of the peace, as by reason of any act or acts of parliament now in force are authorised and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of *freehold*, of their lands or tenements which shall be entered upon with force, or from them withheld by force, shall have the like and the same authority and ability from henceforth, (upon indictment of such forcible entries, or forcible withholdings, before them duly found,) to give like restitution of

possession unto tenants *for terms of years*," &c. &c.

(b) As to restitution *before* trial, upon indictment found, *vide post*, 473 (a), 483 (a).

(c) "The justice or justices have power to summon a jury to try the forcible entry or detainer complained of; and, if the same be found by that jury, then the justices shall make restitution by the sheriff of the possession, *without inquiring into the merits of the title*; for the force is the only thing to be sued, punished, and remedied by them." 4 Bla. Com. 148.

"In an indictment for a forcible

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*Russell*, Serjt., moved for a rule nisi for a new trial upon both points. Upon the second point he contended, that although such evidence would be inadmissible upon an indictment for a forcible entry at common law, it became material, and therefore admissible, upon an indictment under the statute, where restitution was sought. The statute 21 Jac. 1, c. 15, provided for restitution to tenants for terms of years, and it became necessary, therefore, to inquire whether the party claiming restitution as a tenant for a term of years really had such an estate. Here the defendant was precluded from giving evidence to negative the averment of such an estate in the indictment.

PER CURIAM.—The defendant can take his rule upon the first point only. The evidence tendered for him was properly rejected. It is conceded that such evidence would not be admissible in proceedings at common law, and the statute is only declaratory and in furtherance of the common law.

At the sittings in Banc after last Hilary term,

*Maule* shewed cause against the rule. The prosecutor was a competent witness. The only authority cited at the trial in support of the objection to his testimony, was a very recent nisi prius decision in *Rex v. Beavan* (a). *Littledale*, J. certainly rejected the evidence of the prosecutor in that case, but seems to have entertained doubts upon the question; and the point was not brought before the full Court.

entry upon the possession of a lessee for years, proof of the force and of such possession is sufficient, although the indictment also allege that the premises were his freehold, and such allegation is not proved." *Rex v. Lloyd*, Cald. 415.

"An averment in an indictment for a forcible entry, that the prosecutor was seised, is sufficient to found an application for a writ of

restitution; and it need not be shewn by the prosecutor that he still continued to be seised." *Rex v. Dillon*, 2 Chitt. R. 314.

(a) 1 R. & M. 242, 2 Russell on Crimes, 601, where it was ruled by *Littledale*, J. that, "on an indictment for forcible entry and detainer, under the statutes of R. 2, and J. 1, the party aggrieved was not a competent witness."

The argument against the admissibility of the evidence is founded upon the assumption that judgment of restitution must necessarily follow a conviction in this case. But that is by no means clear; for it has been considered that although the statute was imperative upon the justices below to award restitution, it left that matter discretionary with the Court: *Dalton's Justice*, c. 134; *Rex v. Marrow* (a). But even admitting such an assumption to be correct, the prosecutor is nevertheless a competent witness. The prosecutor in this case had no greater interest than prosecutors in many other cases have. The offence of forcible entry was not created such by statute; it existed at common law; and is an offence which the public at large have a direct interest in suppressing. Then a statute which gives a prosecutor a new benefit, as an encouragement to him to perform his duty, ought not to deprive the crown of his testimony, and be construed so as to defeat its own object. The owner of stolen goods, who has prosecuted the felon to conviction, is

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(a) Cases temp. Hardw. 174. That was an indictment for a forcible entry under the statute; and the marginal note of that case is this:—"The Court has a *discretionary* power to award restitution immediately upon a removal of an indictment for a forcible entry by certiorari before plea; and therefore will put the defendant under terms to plead or demur in two days, and if he plead, to take short notice of trial." And Lord Hardwicke, C. J. is reported to have said, "There must be a writ of restitution unless the defendant pleads in a reasonable time. There are very few precedents to be found. But by *Dalton's Justice*, c. 131, p. 314, it appears that the justices of the King's Bench, upon an indictment removed by certiorari, *may* award restitution; and by c. 134, p. 319, of the same book, it is said to be

the law and course of the Court, 'That restitution is a thing in the *discretion* of the Court, and they will grant it or deny it as the justice or reason of the case shall require; and that it being a thing *discretionary*, the equity and reason of the case doth often incline the Court *not* to grant it where they *may* do it, especially if the party in possession shall offer to appear, and go to speedy trial of the right; and so, says the book, I have often observed it to be done.' And Lee, J. added, "The business of the Court is to reaise the party; so the words of the act are; and no damage can happen to the defendant from thence, for the Court, if he shall appear to have right, may afterwards award a writ of restitution to the defendant." *Vide post*. 479 (a), 483 (a).



entitled to a writ of restitution under the statute G. H. 1. 1.  
 2. an ad valorem prosecutor may always be admitted as a competent witness. 1 Cr. 3. That statute gives restitution where the felon and is attainted "by reason of offence given in the debt robbery or owning of the money &c. or in any other of their procurements" and therefore expressly recognizes the owner as a competent witness. 1 Cr. 3. The statute 1 Cr. 1. 1. 45. leaves no doubt as to the judge's right to inflict corporal punishment, or to impose a fine, but it has been held that the expectation of a share of the fine did not render a witness incompetent. 1 Cr. 3. A witness entitled to a share of a penalty under the statute 1 Cr. 1. 1. 57. has been held to be a good witness on an indictment under that statute. Reg. v. Tennant &c. So, in an action upon the statute 2. Geo. 2. c. 24. for bribery at an election, a party is a competent witness, although an action be pending against himself for bribery at the same election, and although he intend to abscond himself, as a first discoverer, of the defendant's conviction, in order to relieve himself from the penalty for

c. Enacted by 7 & 8 Vict. c. 6.  
c. 57. and by 7 & 8 Vict. c. 12,  
s. 17. - It encourages the prosecu-  
tion of offenders," it is enacted,  
that if any person guilty of any  
larceny or misdemeanor under that  
act, or stealing, &c., or its know-  
ingly receiving, any property, shall  
be indicted for such offence by, or  
on behalf of the owner of the pro-  
perty, or his executor or adminis-  
trator, and convicted thereof, the  
property shall be restored to the  
owner or his representative, either  
by writ of restitution to be a-  
warded, or summary order to be  
made, by the Court before whom  
the offender shall be tried. This  
makes some important alterations  
in the law, as the former statute  
extended to prosecutions of thieves

only, and not receivers, and did not include property lost by false pretences, or by other misdemeanours. The owners of stolen goods have always been admitted as competent witnesses under the new statute.

1. This observation, applicable to the old statute, on which the cases adverted to had proceeded, of course decides nothing as to the new statute 7 & 8 Geo. 4, cap. 29, though in force at the time when the principal case was argued.

(c) By Lord *Kenyon* in *Rex v. Cole*, 1 Esp. N. P. C. 169; but that learned judge had at one time entertained a different opinion: see *Rex v. Blackman*, *ibid.* 95.

(d) 3 Esp. N. P C. 68.

which he is sued. *Heward v. Shipley* (a). So, on a prosecution for penalties under the statute 9 Ann. c. 14, s. 5, the loser of money at cards is a competent witness to prove the loss, *Rex v. Luckup* (b); and on a prosecution under the statute 23 Geo. 2, c. 13, s. 1, for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty. *Rex v. Johnson* (c). Indeed, it seems to be a general principle in all criminal prosecutions, that the interests of the public, for whose protection, mainly, the proceedings are instituted, shall prevent those circumstances from operating as a disqualification of the witness, which would clearly render him incompetent in a civil suit. It is upon this principle that rewards payable on the conviction of offenders, whether given by statute, or offered by the crown or by a private individual, have never been held to disqualify the witnesses expecting to receive them. Why should the principle, general as it is in its application, be held not to apply to a prosecution for a forcible entry? There seems no good reason for making such an exception; and without such an exception the prosecutor in this case was a competent witness, and his evidence was properly admitted.

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*Russell* Serjt. and *Talfourd*, contra. There is no real distinction between the circumstances which disqualify witnesses on the ground of interest in civil and criminal proceedings. Generally speaking, undoubtedly, a prosecutor is not incompetent, quâ prosecutor; because the proceedings, though instituted by him, are carried on in the name of the king, and for the benefit of the public; and he is considered in point of law as having no interest in the event. But as soon as it appears that he has a direct interest in the event, he becomes incompetent; not because he is prosecutor, but

(a) 4 East, 180. But the point had shortly before been considered doubtful; see *Edwards v. Evans*, 3 East, 451.

(b) Willes, 425, (c).

(c) *Ibid.*

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because he has such an interest as renders it dangerous to act upon his evidence. Prior to the cases of *Bent v. Baker* (a), and *Smith v. Prager* (b), in which the rule which now prevails was first established, namely, that no mere interest in the subject-matter, but only a direct interest in the event of a suit, shall disqualify a witness, the decisions upon the question, what was a disqualifying interest, had varied, both in the civil and the criminal Courts. But the rule is now well understood and established, and is the same in civil and criminal cases, with some exceptions in the latter, every one of which is grounded either on the express words or obvious meaning of the statute by which it is created. The statute 21 Hen. 8, c. 11, for instance, which has been referred to as giving restitution of stolen goods, in terms contemplates the admission of the testimony of the party robbed; and the various statutes which gave rewards had all of them the same effect, without which, indeed, they would have been wholly nugatory. In *Heward v. Shipley* (c) Lord *Ellenborough* expressly describes these cases, and that of a party robbed under the statute of *Winton* (d), as cases of parliamentary incapacitation. In *Rex v. Boston* (e), *A.* having brought an action against *B.*, the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which *A.* having put in his answer, denying the allegations of *B.*, which involved the merits of the suit at law, the injunction was dissolved; on which answer *B.* indicted *A.* for perjury; and the indictment and action coming on to be tried at the same assizes, the indictment standing first, it was held, that *B.* was a competent witness to prove the perjury, *because he could not avail himself of the conviction of A. in any civil proceeding between them, either at law or in equity.* In that case the principal authorities relating to the competency of witnesses in criminal proceedings were reviewed; and the

(a) 3 T. R. 27.

(b) 7 T. R. 60.

(c) 4 East, 180.

(d) 13 Ed. 1, st. 2, c. 1, 2, repealed by 7 & 8 Geo. 4, c. 27.

(e) 4 East, 572; 1 Smith, 202.

rules of evidence were considered, as they have ever been considered, as resting upon the same principles both in civil and criminal cases. It is laid down by Lord *Hale*, with reference to an indictment for treason, that "if any man hath the promise of the lands or goods of the party, if attainted, he is no lawful witness to prove the treason (a). So *Buller, J.* says, "In an indictment for perjury on the statute of *Elizabeth* (b), the person injured cannot be a witness, because the statute gives him 10*l.*; but in an indictment at common law he may be a witness" (c). This distinction applies expressly to prosecutions for forcible entry at common law and on the statute, and is decisive of the question now before the Court. In the former the prosecutor is a competent witness, because he has no direct personal interest in the event, he is interested merely in the subject-matter, as one of the public. In the latter he is incompetent, because he has a direct personal interest in the event; he is interested in procuring a conviction and thereby obtaining restitution of his property, which the statute gives him only in the event of a conviction. The common law proceeding, which any individual may institute, is abundantly sufficient for the protection of the interests of the public; and where a party chuses to indict upon the statute, which he can do only for the purpose of promoting his personal interest, and of obtaining a private advantage, he must achieve that purpose by means of the testimony of others, and not of his own.

The Court took time to consider of their judgment; which was now delivered by

**BAYLEY, J.**—The defendant in this case was indicted for a forcible entry; and the question raised before us was, whether the prosecutor, the party grieved, the party upon whose possession the forcible entry was made, was or was not a competent witness. The indictment was not framed at common law, but upon the statute 21 *Jac.* 1. c. 15,

(a) 1 *Hale*, P. C. 302. (b) 5 *Eliz.* c. 9. (c) *Bull. N. P.* 289.

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which gives to justices, in cases of forcible entry on the lands or tenements of tenants for terms of years, the same power of awarding restitution of possession, as was given to them as to tenants of the freehold by the statute 8 Hen. 6, c. 9, s. 3. That statute enacts that justices of the peace shall have authority and power to inquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements, as of them which the same hold with force; and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden, as afore, and shall put the party so put out, in full possession of the same lands and tenements so entered or holden as before. It was upon this provision for reseising and restoring the premises, that the objection to the prosecutor's evidence was grounded; and upon the construction of it the question in the case depends; because if the prosecutor was entitled, as a matter of right, to restitution, he clearly had a direct interest in the event, and was not a competent witness. To this objection two answers were given: first, that although the justices below would have been bound to award restitution upon a conviction before them, the Court of King's Bench was not; and secondly, that the legislature could not be supposed to have intended, when conferring an additional benefit, to narrow the means by which the offence was to be proved; and, that as the prosecutor would have been a competent witness before the statute, he continued to be so still. The first point did not seem to be much relied on, for it was not much pressed in argument. One case only was cited in support of it; and that was clearly distinguishable from the present (*a*). And when it is considered that the writ of certiorari merely substitutes this Court for the Court below, it follows that whatever ought to have been done by the Court below, if the case had remained there, ought also to

(*a*) *Rex v. Marrow*, Cas. temp. Hardw. 174. *Vide ante*, 473 (*a*); *post*, 479 (*a*), 483 (*a*), 484.

be done by this Court, when the case is removed hither (a). The second point was that mainly relied on; and it was insisted, that by analogy to cases of rewards, and other statutory benefits, it must be considered as a rule in all criminal cases, that by a statute conferring a benefit upon a person who, but for that benefit, would have been a good witness, his competency is virtually continued, and he is as much a witness after the benefit is conferred as he was before. In cases of rewards the rule is clear, on the grounds of public policy, with a view to the public interest, and consistently with the very principle upon which such rewards are given. The public have an interest in the suppression of crimes, and in the conviction of criminals. It is with a view to excite greater vigilance and activity in apprehending, that rewards are given: and it would defeat the object of the legislature, by means of those rewards, to narrow the means of conviction, and to exclude testimony which would have been otherwise admissible. It is upon the principle, therefore, that the exclusion of the testimony of persons entitled to rewards would be inconsistent with the statutes by which the rewards are given, and against the grounds of public policy, that their competency has been held to be virtually continued. The cases of rewards offered by private individuals, referred to in the argument, stand upon a different principle, namely, that the public have an interest, upon public grounds, in the testimony of every person who has any knowledge of the commission of

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(a) " Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment shall be certified by the justice or justices into the King's Bench, or the same presentment or indictment be removed and certified thither by certiorari, the justices of that Court may award a writ of restitution to

the sheriff, to restore possession to the party expelled; for the justices of the King's Bench have a supreme authority in all cases of the crown." Dalton, c. 44.

" An indictment of forcible entry may be removed from before justices of the peace into the court of B. R. coram Rege, which court may award restitution." 11 Co. Rep. 65. And see *Rex v. Hake*, post, 483, 484.

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a crime, which interest cannot be divested by any act which any private individual may do. The argument founded upon the right of restitution of stolen goods under the statute 21 *Hen. 8*, c. 11, notwithstanding which the owner, who is entitled to such restitution, has always been admitted a witness, was answered during the discussion by a reference to that statute by my brother *Parke*; because that statute expressly provides, that if a felon who robs, or takes away any money, goods, or chattels, be attainted *by reason of evidence given by the party robbed, or owner of the money, &c.*, or by any other by their procurement, the party so robbed, or owner, shall be restored to his money, &c., and the Court shall award them writs of restitution. In *Heward v. Shipley* (a), which followed and was supported by *Bush v. Ralling* (b), and *Phillips v. Fowler* (c), the witness was held to be competent, notwithstanding his interest, upon the spirit and principle of the statute 2 *Geo. 2*, c. 24; and Lord *Ellenborough*, with his peculiar characteristic mode of expression, said, he thought that the statute had given the witness *a parliamentary capacitation*. The two cases that were cited of *Rex v. Luckup* (d) and *Rex v. Johnson* (e) deciding, that the loser of money at cards in a prosecution for gaming, under the statute 9 *Ann.* c. 14, s. 5, and the informer in a prosecution for seducing artificers, under the statute 23 *Geo. 2*, c. 13, s. 1, were competent witnesses on the part of the crown, being confined, as I apprehend they are, to cases of indictments, prove really nothing for this case; because the event of the prosecution, whatever it might be, could not, in either case, work either prejudice, or advantage, to the witness. The penalty is not recoverable by means of an indictment in either case; an action must be brought for it; and a conviction on an indictment would be no evidence in such an action. Besides, neither the loser of the money in the one case, nor

(a) 4 East, 180.

(b) Sayer, 289.

(c) Ibid. 291.

(d) Willes, 425, (c).

(e) Ibid.

the prosecutor of the indictment in the other, is exclusively entitled to the penalty; for in the former it is given wholly to any person who shall sue for the same by action, and in the latter one moiety to the king and the other to any person who shall sue for the same. The prosecution, in both cases, is to be by indictment or information; and in the one case expressly, and in the other impliedly, the penalty is to be recovered by action: and the form of both those cases shews clearly that they were proceedings by indictment or information. The case of *Rex v. Teasdale* (a) was an indictment under the statute 21 Geo. 3, c. 37, s. 1, for exporting machinery used in the manufactures of this country. By that statute the offence is made indictable, and the offender is to forfeit the machinery, to pay a fine of 200*l.*, and to be imprisoned for 12 months, and until the fine is paid; and, by section 7, the forfeitures, where it is not otherwise provided, are to go to the informer. The informer was called as a witness, and objected to on the ground of interest; but Lord *Kenyon* overruled the objection, saying, that the point had been decided long before in a case in *Burrow*, soon after Lord *Mansfield* came into the Court, as to cases of bribery. The reference to *Burrow* is a mistake; and the case to which Lord *Kenyon* alluded is probably that of *Bush v. Ralling* (b), which was decided in the interval between the death of Sir *Dudley Ryder*, and the appointment of Lord *Mansfield*, in Trinity term, 1756, when there was no chief justice. It was an action upon the bribery act, 2 Geo. 2, c. 24, and the party bribed was admitted a witness. Upon motion for a new trial, two objections were made to his admissibility: first, that he was *particeps criminis*, and, secondly, that the tendency of his evidence was to relieve himself from penalties and disabilities. *Dennison, J.*, in delivering the opinion of the Court, in which he said the late chief justice had concurred, after observing that there were many cases in which a *particeps criminis* was a competent witness, thus expressed himself:

(a) 3 Esp. N. P. C. 68.

(b) Sayer, 289.

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" But another answer deducible from a clause in 2 *Geo.* 2, c. 24. may be given. That clause (a) discharges a discoverer, if the person discovered be thereupon convicted, from all penalties and disabilities he had incurred. This seems to be a legislative declaration, that one person offending against this act may be a witness against another; for it is not probable the legislature should intend to discharge one offender, upon his discovering another offender against it, in such a manner that the latter be convicted, without intending at the same time that the former should be a witness against the latter." That decision was acted upon as clear and unquestionable by Lord *Mansfield* and the Court in a subsequent case of *Sutton v. Bishop* (b), explains satisfactorily the feeling of Lord *Kenyon* in *Rex v. Teasdale* (c), and the principle upon which he acted. He considered the term " informer " in the 21 *Geo.* 3, c. 37, as equivalent to the term " person discovering " in the 2 *Geo.* 2, c. 24, and that as it had been decided that the person described as " the person discovering " in the one case was intended to be made a witness, the same intention must be presumed as to the person described as " the informer " in the other. Both were cases of secrecy, and the public had an interest in the discovery and punishment of the offenders. This, therefore, was a case in which it was implied, from the tenor and provisions of the statute, that the legislature intended to render a person competent who otherwise would not have been so; and instead of breaking in upon the general rule, merely establishes an exception. The general rule in all proceedings criminal as well as civil is, that a person interested in the event is not a competent witness. Here the prosecutor was interested in the event; because a conviction would entitle him to judgment of restitution. Then is there any thing in the nature of the case from which we are warranted in implying such an exception as was implied in the cases to which I have referred? Nothing.

(a) Section, 8.

(c) 3 *Esp. N. P. C.* 68.

(b) 4 *Burr.* 2283; 1 *W. Bla.* 665.

The interests of the public may still be vindicated by a common law indictment; and there is nothing from which the inference can be fairly drawn, that it was with a view to the interests of the public, and not for the private advantage of the party grieved, that the provision for restitution was introduced into the statute. For these reasons we are of opinion that the evidence of the prosecutor ought not to have been received; and, therefore, that the rule for a new trial ought to be made absolute.

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## Rule absolute (a).

(a) Shortly before Hilary term, 1826, a declaration in ejectment, on the demise of *Edward Hannam and Wyndham*, was served upon *John Hake*, the tenant of a farm at Buckland St Mary, in the county of Somerset. *Hake* having appeared to this ejectment, signed a cognovit, by the terms of which he agreed to give up possession of all the lands in course for a wheat crop on the 29th of September, 1826, and the remainder of the premises on the 6th of November following. Possession having been demanded and refused, judgment was entered up in Michaelmas term, and a writ of habere facias possessionem was issued; under which, after considerable difficulty, occasioned by the resistance of *Hake* and his companions, *Hake* was removed from the premises. On the 21st of June following, *Hake*, with several other persons, broke into the house, turned off the cattle, and retook possession of the premises. At the following Bridgwater assizes, (August, 1827) a bill of indictment was preferred and found against *Hake* and his companions. In this indictment, the first count charged that the de-

fendants on &c. with force and arms, and unlawfully and with a strong hand, had entered into certain messuages and lands, to wit, &c. situate &c., then being the freehold and in the possession and occupation of said *Hannam and Wyndham*, and had then and there, with force and arms, unlawfully with a strong hand, and without judgment recovered, disseised said *Hannam and Wyndham*, and expelled and put out said *Hannam and Wyndham* from their possession of the said messuages and lands, and with force and arms from the day and year aforesaid, until the taking of this inquisition, had kept out and still did keep out said *Hannam and Wyndham* so disseised, expelled and put out as aforesaid, against the form &c. The second count charged that *Hannam and Wyndham* had been lawfully possessed of certain other messuages and lands, to wit &c., situate &c., for a certain term of years then to come and yet unexpired, and that *Hannam and Wyndham* being so possessed thereof, defendants on &c., with force and arms, had unlawfully entered &c., and with force and arms had then

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and there unlawfully expelled and put out the said *Hannam* and *Wyndham* from the peaceable possession of the last mentioned messuages and lands; and that the defendants with force and arms them the said *Hannam* and *Wyndham* from &c., until the taking of this inquisition, from the possession of the last mentioned messuages and lands, with force and arms, wrongfully and unlawfully then and there had kept out, and still did keep out. The third count charged that the defendants on &c. with force and arms wrongfully, unlawfully, violently, and forcibly had entered into certain other messuages and lands, to wit &c., situate &c., then being in the peaceable possession of the said *Hannam* and *Wyndham*, and that the defendants had then and there with force and arms wrongfully, unlawfully, forcibly, and violently expelled, amoved, and put out the said *Hannam* and *Wyndham* from the possession of the last mentioned messuages and lands; and the said *Hannam* and *Wyndham* so expelled, put out, and amoved from the possession thereof, as aforesaid, with force and arms wrongfully, unlawfully, forcibly, and violently had kept from &c., until &c., and still did keep out.

Upon this finding, and upon an affidavit of the facts, *Manning* moved before *Burrough*, J. for an order of restitution, upon the authority of the cases collected in *Com. Dig. Forceable Entry* (D 4). The order was made; and the following warrant issued under the seals of the two learned judges:

"Somersetshire to wit, Sir *William Draper Best*, Knight, Chief

Justice of our lord the king, of his Court of Common Pleas, and Sir *James Burrough*, Knight, one of the justices of our lord the king, of his said Court of Common Pleas, justices of our lord the king, assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, trespasses and other evil doings committed within the same county: To the sheriff of the county of Somerset, greeting. Whereas, by an inquisition taken before us at Bridgwater, in the said county, on this present eighteenth day of August, in the eighth year of the reign of our said lord the king, upon the oaths of the Honourable *William Waldegrave*, *William Dickinson*, *George Edward Allen*, *John Goodford*, *Philip John Miles*, *William Hanning*, *Vincent Stuckey*, *William Helyar*, *Richard Thomas Combe*, *Jeffrys Allen*, *Jeffrys Thomas Allen*, *Thomas Shezwell Bailward*, *James Bennett*, *Robert Phippen*, *John Barrow*, *Francis Byrt Morgan*, *John Hugh Smyth Pigot*, *Thomas Savage*, *Reginald Henry Bean*, and *John Maddison*, esqrs.; and by virtue of the statutes made and provided, in cases of forcible entry and detainer, it is found, that *John Hake*, late of the parish of Buckland St. Mary, in the county of Somerset, yeoman, and *Mary* his wife, *John Hake* the younger, late of the same place, yeoman, *John Pinner*, late of the same place, yeoman, and *John Hooper*, late of the same place, yeoman, on the 21st day of June, in the eighth year of the reign of our lord the king, with force and arms, unlawfully and with a strong hand, did enter into certain mes-

suages and lands, to wit, 10 messuages, 10 barns, 10 stables, 10 coach-houses, 200 acres of meadow, 200 acres of pasture, 200 acres of other land, situate, lying, and being in the county aforesaid, to wit, in the parish aforesaid, (following the description of the premises contained in the declaration in ejectment) then being the freehold and in the possession and occupation of *Edward Hannam* and *Wadham Wyndham*, and then and there unlawfully and with a strong hand, and without judgment recovered, disseised the said *Edward* and *Wadham*, and expelled and put out the said *Edward* and *Wadham* from their possession of the said messuages and lands; and with force and arms, unlawfully and with a strong hand, from the day and year aforesaid until the taking of that inquisition, have kept out and still do keep out the said *Edward* and *Wadham*, so disseised, expelled, and put out, as aforesaid; against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown, and dignity. As by the same inquisition more fully appeareth of record. Therefore on behalf of our said lord the king we charge and command you, that taking with you the power of the county, if it be needful, you go

to the said messuages and lands, and that the same you cause to be resealed, and that you cause the said *Edward* and *Wadham* to be restored and put into their full possession thereof, according as they before the entry aforesaid were seised, according to the form of the said statutes. And this you shall in no wise omit, under the penalty thereon incumbent. Given under our hands and seals, at Bridgwater, in the same county, the 18th day of August, in the eighth year of the reign aforesaid."

Under this warrant restitution was made by the sheriff to the prosecutors of the indictment; to which, at the ensuing Spring Assizes, the defendants pleaded guilty.

The finding of a bill of indictment for a forcible entry is necessary to give the Court jurisdiction to award restitution; but as such a bill is commonly found wholly or in part upon the testimony of the party entitled to restitution, the Court will not award restitution upon an indictment found, unless a sufficient case for their interference be made out by affidavit.

And see *Rex v. Marrow*, Cas. temp. Hardw. 174, part of the judgment in which case is given, *suprà*, 473(a), *et vide suprà*, 478(a), 479(a), 482(a), 483.

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A bankrupt who assigns in the sale of his own goods under the commission, for the purpose of preventing his property and saying that it is sold to the best advantage, is not thereby exempted from disputing the validity of the commission.

Neither is he so exempted by giving notice to his lessors of a farm that he is a bankrupt and is willing to deliver up the lease, which they accept, his assignees not being parties or privies to the transaction.

A person purchasing land for the purpose of making bricks from it, and selling them, and agreeing to pay 4s. per 1000 bricks in part of the purchase-money, and making

an agreement not a bargain of 4s.

**DECLARATION** in trover for household goods. Plea, not guilty. Issue thereon. At the trial before Gaselee, J. at the Gloucestershire Summer Assizes, 1828, the case was this:—The plaintiff had been declared a bankrupt under a commission of bankrupt which issued against him in August 1826, and the defendants were his assignees, in which character they had seized and sold the goods in question. The action was brought to try the validity of the commission. One question was whether the plaintiff had been a trader within the meaning of the bankrupt laws, upon which the following evidence was adduced:—Before the 10th of May 1824, the plaintiff had carried on business as a builder at Cheltenham, and on that day he, as he stated in his examination before the commissioners, purchased of Colonel Olney five acres of land near Cheltenham at the price of 2,400*l.* The purchase money was to be paid in five years, with interest at four pounds per cent. The land was intended for the making of bricks, and it was agreed that 4*s.* for every 1000 bricks made should be paid to Colonel Olney in part liquidation of the purchase money, and the plaintiff signed an agreement to that purport. A deposit of 100*l.* was to be paid in six months. A memorandum of agreement was drawn accordingly, and was signed by the plaintiff and Colonel Olney; and instructions were given to prepare a formal agreement on a stamp, which, however, was never done. During the years 1824, 1825 and 1826, the plaintiff made bricks upon the land, and sold them, the bricks being made in the usual mode from soil dug from the land agreed to be purchased by the plaintiff. In June, 1825, the plaintiff entered into partnership with two persons named Packwood and Edwards in the business of brickmakers. It was understood that they were to take two-thirds of the land, but there was not any agreement in writing. That partnership was dissolved on the 28th of June, 1826; and notice

of the dissolution, signed by all the partners, was published in the Gazette of the 30th of June, 1826. It was contended on the part of the plaintiff that the five acres of land had been purchased with a view to his original business of a builder, and, therefore, that he was not a trader within the meaning of the bankrupt laws. This was denied on the part of the defendants; and it was further insisted that even if the plaintiff was not a trader within the meaning of the bankrupt laws, still he was by his own acts estopped from disputing the validity of the commission. Upon this second question the following evidence was adduced:—A few days before the plaintiff's goods were sold, a meeting was held by him, the defendants, and the auctioneer, for the purpose of considering the most beneficial mode of disposing of the property. At the time when the commission issued, the plaintiff was the lessee of a farm under Messrs. *Wilkins*, at the rent of 350*l.* per annum, for a term, a year and a half of which was unexpired. The farm had yielded him no profit for the last two years. The plaintiff, under the provisions of the bankrupt act, 6 Geo. 4, c. 16, s. 75, on the 12th September, 1826, gave the following notice to his lessors:—"I, the undersigned *James Heane*, of the city of Gloucester, brickmaker, dealer, and chapman, *a bankrupt*, do hereby give you notice that I am ready and willing, and hereby offer, to give up and deliver unto you a certain indenture, purporting to be a lease of Walsworth Hall estate, dated the 17th of September, 1817, made between you the said *W. Wilkins* and *W. Wilkins* the younger, of the one part, and myself of the other part; and also the possession of the messuages, lands, tenements, and hereditaments, therein comprised." Upon receiving this notice the lessors accepted the lease and took possession of the premises. Upon this evidence the counsel for the plaintiff contended, that the plaintiff had made the bricks from his own land, as a mode of enjoying the profits of it, and therefore was not a trader within the meaning of the bankrupt laws, and

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they cited *Wells v. Parker* (a) and *Sutton v. Weeley* (b). The counsel for the defendants, on the other hand, contended that even if the commission could be deemed invalid, which they denied, the plaintiff, having availed himself of it, for the purpose of relieving himself of his lease, was estopped from disputing the validity of the commission; and they cited *Watson v. Wace* (c). The learned judge was of opinion that the plaintiff's interference in the sale arose from a natural anxiety to protect his property and to see that it was sold to the best advantage, and, therefore, that he was not estopped on that ground; but that his availing himself of the commission to obtain the benefit of surrendering the lease, was such a recognition of it as did estop him from disputing its validity afterwards. His lordship, therefore, told the jury that the defendants were entitled to a verdict, but desired them to find specially whether or not the land had been taken expressly for the purpose of making bricks, and they found that it had. A verdict was then entered for the defendants, but with liberty for the plaintiff to move to enter a verdict in his favour for 440*l.* the value of the goods sold, if the Court should be of opinion that he was not estopped, and that he was not a trader within the meaning and operation of the bankrupt act. In Michaelmas term last a rule nisi having been obtained accordingly, cause was now shewn against it by

*Taunton, Campbell, and Philpotts*: First, the plaintiff was a trader within the meaning of the bankrupt act, 6 Geo. 4, c. 16, s. 2. That section, after enumerating various traders, enacts, that "all persons who, either for themselves or as agents or factors for others, seek their living by buying and selling, or by buying and letting for hire, or by the workmanship of goods or commodities, shall be deemed traders liable to become bankrupt." *Ex parte Burgess* (d)

(a) 1 T. R. 34.

(c) 7 D. & R. 633; 5 B. & C.

(b) 7 East, 442; S. C. 3 Smith's 153.

Reports, 445.

(d) 2 Glyn & J. 183.

will be cited as an authority to shew that the plaintiff was not "a person seeking his living *by the workmanship of goods or commodities*;" and to that extent the authority of that case must be admitted; but it leaves untouched the question, whether a person making bricks for sale is "a person seeking his living *by buying and selling goods or commodities*." That question has been frequently discussed. The general doctrine deducible from the modern cases bearing on the subject is laid down by Mr. Eden in his Treatise on the Bankrupt Laws thus:—"Where the business of brickmaking is carried on as a mode of enjoying the profits of a real estate, it will not make the party liable to the bankrupt law, *Wells v. Parker*(a), *Sutton v. Weeley*(b). But where it is carried on substantially and independently as a trade, it will do so, *Ex parte Harrison*(c); and there is no difference whether the party is a termor or entitled to the freehold, *Ex parte Gallimore*(d). The same general doctrine applies to the case of a person manufacturing alum, lime, or selling minerals from his own quarry"(e). The real question in every case of this sort is, what was the real object of the party, whether to carry on the trade of a brickmaker, or to use that trade as a mode of enjoying the profits of the land. Where a person making and selling bricks, is not the owner of the land, his intention is plain; he must have made the bricks for the purpose of carrying on a trade. Where he is owner of the land, his intention may be doubtful, and must be collected from other circumstances. Looking at the facts of this case it is impossible to doubt about the intention of the plaintiff. His object clearly was to carry on trade as a brickmaker; for he purchased the land, not to make a profit of it as land, but for the express purpose of making and selling, or trading in, bricks; and so the jury have found specially. *Sutton v.*

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(a) 1 T. R. 34.

(d) 2 Rose, 424.

(b) 7 East, 442; 3 Smith, 445.

(e) Eden's, B. L. 3.

(c) 1 Bro. C. C. 173.



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*Weeley* (a) and *Ex parte Burgess* (b) were very different cases from the present. There the persons carrying on the trade were tenants for life of the freehold; they did not purchase the land for the purpose of carrying on trade as brick-makers: but they carried on trade as brickmakers as a mode of enjoying the profits of the land. Here the plaintiff, on the contrary, did purchase the land for the purpose of carrying on trade as a brickmaker, and did not carry on trade as a brickmaker as a mode of enjoying the profits of the land. Besides, the plaintiff in this case carried on the trade in partnership with two other persons. Those two other persons had no interest in the land, legal or equitable; therefore they were clearly traders, as brickmakers, liable to the bankrupt laws. And if they were so, their partner, the plaintiff, was equally so; for it has been held that an acknowledgment by a person that he was in partnership with another as a trader, was sufficient to constitute him a trader within the meaning of the bankrupt laws, although no acts of buying and selling were proved to have taken place during the partnership: *Parker v. Barker* (c). Moreover, it is difficult to say that the plaintiff was the owner of the land, or had any real interest in it. His interest was merely under an imperfect contract for the purchase of the land. He never had any conveyance of the land. He was to pay 4s. for every thousand bricks made on the land; so that if he can be considered as having purchased any thing, he purchased at most only the clay of which the bricks were made: and if so, upon the authority of *Ex parte Harrison* (d), he was clearly a trader liable to be made a bankrupt. Secondly, the plaintiff is estopped by his own acts from disputing the validity of the commission issued against

(a) 7 East, 442; 3 Smith, 445.

(b) 2 Glyn & J. 183.

(c) 3 Moore, 226; 1 B. & B. 9.

(d) 1 Bro. C. C. 173, where it was held that a man who dealt in bricks made of earth taken from the waste, without any licence from the lord, to whom he afterwards

paid a consideration, was a trader.

"It seems that a man who makes bricks for sale, upon land demised to him for a term of years, and sells them, is a trader. *Vide Wells v. Parker*, 1 Brown, 178; *Port v. Turton*, 2 Wilson, 169." Montagu's B. L.

him. He interfered in the sale of the effects, therefore he cannot now be allowed to call that sale a conversion. *Clarke v. Clarke* (a) is an express authority upon this point; for it was there held that if a person, against whom a commission of bankrupt issues, acquiesces in it so far as to take a part in the sale of his own effects under the commission, he shall not afterwards be allowed to question it. Besides, the plaintiff availed himself of the commission for his own benefit, and thereby relieved himself from his lease and the performance of the covenants contained in it. That also estops him from disputing the validity of the commission. This is, in principle, as strong a case against the plaintiff as that of *Watson v. Wace* (b), where it was held that a bankrupt who obtained his discharge out of custody, on the ground that his detaining creditors had proved under the commission, had by so doing precluded himself from disputing the validity of the commission. There the bankrupt was in actual custody at the suit of the petitioning creditor at the time when the commission issued: here he was liable to the performance of the covenants in his lease at the time when the commission issued. There the bankrupt obtained his discharge out of custody, by means of an application to a judge, in which he stated that a commission had issued against him, under which he had been duly declared a bankrupt: here he relieved himself from his lease and its consequences by means of a notice to his lessors, in which he stated that he was a bankrupt, and that he was willing to deliver up his lease. In both cases the plaintiff described himself as being a bankrupt, which he could not be unless he had previously been a trader; and in this case, having derived a benefit from the commission, he cannot now be permitted to say that it is void because he was not a trader. Lord *Tenterden*, in *Watson v. Wace* (b), declares the general principle to be, that when a bankrupt has availed himself of the advantage which the law gives him as a bankrupt, he cannot be allowed afterwards to turn round upon his assignees and say that he is not a bankrupt. The same

(a) 6 Esp. 61.

(b) 7 D. &amp; R. 633; 5 B. &amp; C. 153.

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principle had been previously laid down by the Vice-Chancellor in *Ex parte Cutten* (a), where it was said, that "the bankrupt's active interference with the administration of his estate amounted to a pledge to his assignees that he would not disturb the commission, and that his conduct had been calculated to induce his assignees to prosecute the commission in security;" and where he was restrained, upon that ground, from proceeding in an action against the messenger, to impeach the commission.

*Ludlow and Russell*, Serjts., contra. First, as to the supposed estoppel. The plaintiff's interference in the sale cannot so operate. He had no power to prevent the sale; and he had a right to see that it was conducted in the most advantageous manner, whether it should be his creditors or himself who might ultimately receive the benefit of the proceeds; his interference, therefore, shewed, not that he assented to the commission, but merely that he wished to protect the property, and have the most made of it. The case of *Watson v. Wace* (b) is very distinguishable from the present. There, the plaintiff obtained the benefit which he sought, namely, his discharge out of custody, and that by a peremptory order made *in invitum* for his discharge. Here, the plaintiff had done nothing to entitle himself to any benefit under the commission. His notice to his lessors amounted to no more than a mere proposal on his part to deliver up the lease. He had no power to enforce that proposal, nor did he make it *in invitum*, as in *Watson v. Wace* (b); and there was no proof that he availed himself of it to obtain any benefit under the commission, because there was no proof that the lease had been previously offered to the assignees, and that they had declined it. But estoppels are binding only upon parties and privies, not upon strangers. Now the plaintiff and the defendants were strangers; there was no privity between them with respect to the transactions by which it is contended that he is estopped. As between himself and his lessors, he may

(a) 1 Glyn & J. 317.

(b) 7 D. & R. 633; 5 B. & C. 153.

be estopped from saying that he is not a bankrupt, but he clearly is not as between himself and the defendants. This case is within the decision in *Niercer v. Wise* (a), where it was held, that a trader, who has been declared a bankrupt, does not preclude himself from trying the validity of the commission in an action against the assignees, by having surrendered under the commission, and by having presented a petition to the Lord Chancellor to enlarge the time for his surrender.

Secondly, as to the supposed trading. The question of trader or no trader, within the meaning of the bankrupt act, is a question *juris positivi*; it cannot be matter of inference. The term, brickmaker, is not inserted in the statute 6 Geo. 4, c. 16, though it was in the immediately preceding statute 5 Geo. 4, c. 98. It was, therefore, clearly intended to be excluded. The terms of the agreement for the purchase of the land, made between Colonel *Olney* and the plaintiff, are disclosed in the examination of the latter before the commissioners. The 4s. for every 1000 of bricks to be made was to be paid, not as the price of the clay taken from the land, but as part of the purchase-money. He agreed to purchase the land itself, not a temporary interest in it; and by that agreement he became the equitable owner in fee of the land itself. Then he was clearly no trader as a brickmaker, because the cases already cited of *Wells v. Parker* (b), *Sutton v. Weeley* (c), and *Ex parte Burgess* (d), have established, beyond all doubt, that the owner of land which contains brick earth, who converts that earth into bricks, which he sells, is not, by so doing, a trader within the meaning or operation of the bankrupt laws. There is one very recent case in this Court upon the subject, *Paul v. Dowling* (e). There the owner of land in Berkshire burnt bricks from the clay contained in it, and bought chalk to burn with them; that being a usual and convenient way of making bricks in that county, though not

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(a) 3 Esp. 219.

(d) 2 Glyn & J. 183.

(b) 1 T. R. 34.

(e) 1 M. & M. 263; 3 C. & P. 500.

(c) 7 East, 442; 3 Smith, 445, S.C.

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necessary for the particular clay; he then sold the bricks, and the lime produced from the chalk. It was held by Lord Tenterden, C.J., that the selling the lime did not make the party a trader within the bankrupt laws, his object in buying the chalk being the more convenient burning of the bricks, and not the profit derived from the sale of the lime. That was a stronger case than the present, and is decisive of it as regards this point. The decision in *Parker v. Barker* (a) does not touch the present case. That case decides, that an acknowledgment by a bankrupt that he is in partnership with another person who is a trader, is *prima facie* evidence, evidence to go to a jury, that the bankrupt himself was a trader also; but not that it is conclusive evidence: and here that *prima facie* evidence becomes a nullity, because it is completely rebutted by the other facts of the case.

The Court took time to consider of their judgment, which was afterwards delivered by

BAYLEY, J.—Upon the learned Judge's report of this case two questions arose for our consideration, first, whether the plaintiff was estopped from disputing the validity of the commission which had been issued against him, and under which the defendants acted, and if he was not, then secondly, whether the commission was valid.

Upon the first point two circumstances were relied on at the trial, and by the defendants' counsel in argument, as shewing that the plaintiff was estopped from disputing his bankruptcy; first, his personal interference in the sale of his goods, for the conversion of which, by that sale, the action was brought; and secondly, his having served his landlords, Messrs. *Wilkins*, with a notice, offering to give up a lease which he held of them, and describing himself as a "brickmaker, dealer, and chapman, a bankrupt." The learned Judge, at the trial, thought that the first of these circumstances was merely an interference for the purpose

(a) 3 Moore, 226; 1 B. & B. 9.

of taking care of the property, and of seeing that it was disposed of to the best advantage, and that such an interference did not amount to a consent to the sale, and that the plaintiff was not estopped by it; but he thought that, having availed himself of the commission to derive a benefit from it, by surrendering his lease, he was, by that act, estopped from saying that he was not a bankrupt: but that point he reserved for the consideration of the Court. In the opinion formed by the learned Judge upon the first point, we entirely concur; in his opinion upon the second point we cannot acquiesce. There can be no doubt that the express admission of a party to the suit, or an admission implied from his conduct, is evidence, and strong evidence, against him; but we think he is at liberty to shew that any such admission was misunderstood or untrue, and that he is not estopped or concluded by it, unless it has had the effect of altering the condition of some third person; where it has such an effect, the party is estopped from disputing its truth as against that person, and those claiming under him, and that transaction, but as against strangers he is not so estopped. It is a well established rule of law, that estoppels bind parties and privies only, not strangers; Co. Litt. 352, a.; Com. Dig. Estoppel, (C). The offer of surrendering the lease made in this case, was made to strangers to this suit; and though the bankrupt may have been bound by his admission that he was a bankrupt, as between him and those strangers to whom he made that admission, and who were induced to act upon it, for they accepted the surrender of the lease, he is not bound as between him and the defendants, to whom the admission was not made, and who were not in any degree induced to act upon it. As against his landlords, the bankrupt, probably, would not have been allowed, after having induced them to accept the lease without a formal surrender in writing, and to resume possession of the farm under the belief that he was a bankrupt, and entitled under the bankrupt act (a) to give

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(a) 6 Geo. 4, c. 16, s. 75.

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it up, to say afterwards that he was not a bankrupt, and to maintain either trover for the lease or ejectment for the land. To that extent we think he would have been bound, though probably no farther, and certainly not as to any other persons than his landlords. We consider this to be the rule of law; and we are of opinion that the bankrupt was not, in point of law, estopped by his notice and proposal of surrender; and, indeed, it appears to us that it would be a very great hardship upon him if he were so estopped. It is quite clear that his merely surrendering under the commission is no estoppel, *Mercer v. Wise (a)*, and upon the soundest principles, for it would be a perilous thing, indeed, for a bankrupt to dispute a commission, and try its validity by such means. An observation similar in its nature, though not equally extensive, applies to the act done by the bankrupt in this case. His commission sweeps away all his property; disables him from carrying on his business; prevents him from occupying his farm to advantage; to continue in such a situation would be ruinous; to have rent to pay, and to be liable to the performance of covenants in a lease, without the possibility of receiving any adequate remuneration, would be disadvantages too great for any man to encounter; it is impossible to suppose that any man would continue in such a situation, and incur such losses, merely with the view of being enabled to dispute with effect the validity of his commission. It is but just and reasonable that he should endeavour to do, and should be allowed to do, the best he can for himself and his family, in the unfortunate situation in which he finds himself placed.

We do not think it necessary to refer particularly to the cases cited in argument, in which it has been held, that a bankrupt is precluded from disputing the validity of his commission. In *Clarke v. Clarke (b)* the bankrupt procured and sanctioned the sale of his own goods, and was therefore properly held not entitled to call that sale a conversion.

(a) 3 Esp. 219.

(b) 6 Esp. 61.

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In *Like v. Howe* (a) the bankrupt solicited different creditors to vote for particular persons as his assignees, and was therefore properly held not entitled to dispute the title of those persons as assignees. In *Wulson v. Wace* (b), the latest case upon this subject, there is a clear distinction from the present; because there *Wace*, one of the defendants, was the person from whose suit the plaintiff had been discharged; and therefore he might, perhaps, be estopped as against that person, by his own conduct towards him.

The second question is, whether the commission was valid; the objection to its validity being that the bankrupt was not a trader within the meaning of the bankrupt act; and we are of opinion that he was not. His own examination before the commissioners shews that he purchased five acres of land near Cheltenham for 2400*l.*, and that he intended to use the land for the purpose of making bricks, and, no doubt, of selling the bricks, when made. He contracted to purchase in fee; and though he never had any conveyance of the legal estate, he had a good equitable title to the fee, there having been an agreement in writing, under which he had been let into possession. He was, therefore, in the same condition as if he had been the owner in fee: for the purpose of this argument we can see no sound distinction between a legal and an equitable title to the fee. Looking at all the facts in this case, we think it cannot be intended that he bought the land for the sole purpose of making bricks upon it; because the price was far too large; though if he did, it would, in our judgment, be immaterial. He there made and sold bricks; and the question is, whether his so doing constituted him a trader. This is a question *juris positivi*, depending wholly upon the construction of the bankrupt acts. The earliest of these statutes, the 34 & 35 *Henry* 8, c. 4, (which is referred to by Lord *Ellenborough* in *Sutton v. Weeley* (c), as containing in its preamble the principle of the bankrupt laws,) recites, "that

(a) 6 *Esp.* 20.(c) 7 *East*, 442.(b) 7 *D. & R.* 633; 5 *B. & C.* 153.



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divers persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume their substance obtained by credit of other men." The next, the 13 *Eliz.* c. 7, differs little in its provisions, as to persons liable to be made bankrupts, from the 1 *Jac.* 1, c. 15, and the 21 *Jac.* 1, c. 19, the latter of which provides, that all persons that "use the trade of merchandise, by way of bargaining, exchange, bartering, chevisance, or otherwise, in gross or by retail, or seeking his, her, or their living by buying and selling," upon committing acts of bankruptcy, shall be accounted and adjudged bankrupts. The buying and selling contemplated by that statute, construing the words with relation to the context, and to the preamble of the first statute, is clearly the buying and selling of goods; and in order to constitute such buying and selling, there must be a buying as well as a selling of goods.

A series of cases decided upon these statutes, and ending with that of *Ex parte Gallimore* (a), established the rule, that if a person makes bricks on his own estate, and sells them, as a mode of enjoying the profits of the estate, he is no trader; and that it makes no difference whether he be a freeholder or a termor; if he carry on the business as a mode of making a profit of the soil which he has as his own, whatever his interest in the soil may be, he does not, in the language of the act of parliament, "seek his living by buying and selling;" and therefore he is not liable to the bankrupt laws in that character. But where a man pursues brickmaking substantially and independently as a trade, he is so liable; as if, for instance, he buys the brick earth as a chattel, (and perhaps if he bought the brick earth only to be consumed by himself, he might be considered as buying a chattel,) and purchasing other necessary materials, sells the bricks made with that earth, he is a trader;

(a) 2 Rose, 424.

because then he is a person seeking his living by buying and selling goods. It is clear, therefore, that, under the old statutes, the plaintiff in this case could not have been considered a trader; nor can he under the present statute of 6 Geo. 4, c. 16, as a person "seeking his living by buying and selling." There are, undoubtedly, some additional words in that statute, including persons who "seek their living by the workmanship of goods or commodities." The case of *Ex parte Burgess* (a), however, has decided, and we think properly, that those words do not apply to a person making bricks on his own estate. They seem to have been introduced for the purpose of meeting the cases of persons who do not buy and sell, but have other men's goods entrusted to them, so as to bring them within the operation of the bankrupt laws, such as bleachers, fullers, lace-makers, stocking-knitters, and the like, who manufacture goods for others; and not to apply to those who employ workmanship on goods, as a part of the profits of their land, such as farmers making cheese or cider, alum-makers, lime-burners, brick-makers, and the like. We concur in the opinion expressed by the Lord Chancellor in that case, upon the construction to be given to those words of the statute; and we are therefore of opinion, first, that the plaintiff is not estopped from disputing the validity of the commission issued against him; and secondly, that that commission is invalid, the party not having been a trader within the meaning of the bankrupt act. The consequence is, that the rule for entering a verdict for the plaintiff for 440*l.* must be made absolute.

Rule absolute.

(a) 2 Glyn & J. 183.

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GREGORY v. PIPER.

A master ordered his servant to lay rubbish near his neighbour's wall, but not to let it touch the wall. It did, naturally and unavoidably, touch the wall, in spite of the servant's care to prevent it. The master was held liable in *trespass* (a).

**TRESPASS** for depositing rubbish against the plaintiff's wall and gates. Plea, not guilty, and issue thereon. At the trial before *Alexander*, C. B., at the Cambridgeshire summer assizes, 1828, the case was this:—The plaintiff was the occupier of a public house called *The Rising Sun*, in Newmarket, together with a stable-yard thereto belonging. The way to his stables lay by a back gate in High Street, through a yard called *Old King's Yard*. The defendant was the proprietor of the ground surrounding *Old King's Yard*, and disputed the plaintiff's right to pass through it to his stables. He accordingly employed a labourer named *Stubbings* to lay rubbish, consisting of bricks, mortar, stones, and dirt, near the plaintiff's stable-yard, in order to obstruct the passage. *Stubbings* did, on the 26th of April, and several successive days, lay rubbish accordingly, some of which rolled against the plaintiff's wall and gates, and lay there to the height of about two feet, and to the length of about six yards. *Stubbings*, who was the witness to prove the plaintiff's case, deposed, that the defendant had employed him to lay the rubbish, but had charged him not to let any of it touch the plaintiff's wall; that he obeyed those instructions as well as he could, and originally laid the rubbish at a distance of four or five feet from the wall; but that the rubbish being of a loose kind, as it became dry naturally shingled down towards the wall, and at length unavoidably rolled against it. The defendant had been requested by the plaintiff to remove the rubbish, but he refused to do so, and the present action was brought. It was objected, on the part of the defendant, that this form of action, *trespass*, was not maintainable under such circumstances; for as the defendant had ordered his servant not to let the rubbish touch the plaintiff's wall, its having touched it was occasioned by the negligence of the servant, for which the proper form of action was *case*. The learned Judge overruled the objection, and directed the jury to find

(a) *Vide post*, 502, (a).

a verdict for the plaintiff, but gave the defendant permission to move to enter a nonsuit. A rule nisi having been obtained accordingly,

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*Storks*, Serjt., and *F. Kelly*, appeared to shew cause, but were stopped by the Court, who desired to hear

*Denman* and *Gunning* in support of the rule. The plaintiff has misconceived his form of action. A master is not liable in trespass for the wilful act of his servant, done without his direction or assent, *M'Manus v. Crickett* (a); and an action on the case, and not an action of trespass, is the proper remedy for an injury done to the plaintiff by the negligent conduct of the defendant's servant; *Morley v. Gaisford* (b). It is an established principle of law, that if a servant, who is ordered to perform a lawful act, exceeds his authority, and thereby commits an injury, the master is not liable. Here the master expressly ordered the servant to take care that the rubbish did not touch the plaintiff's wall. If the thing complained of had been the certain and inevitable consequence of the act done, the master might have been liable; but it was not so: the servant might by great care have prevented the rubbish from touching the plaintiff's wall.

BAYLEY, J.—A trespass has been committed; and the only question is, whether that trespass was or was not, in point of law, the act of the master. I am clearly of opinion that it was. It is true that the master directed the servant to lay the rubbish so as not to let any of it touch the plaintiff's wall; but if, in the execution of the order, it was the natural and unavoidable consequence of the act ordered to be done, that some of the rubbish should touch the wall, the master is undoubtedly liable in trespass. Here the evidence shewed that such was the natural and unavoidable

(a) 1 East, 106. And see *Brucker v. Fromont*, 6 T. R. 659. (b) 2 H. Bla. 442.

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consequence, and therefore the master is liable in trespass. This rule must be discharged.

LITLEDALE, J.—I agree with my brother *Bayley*. If a servant performs work by order of his master, under a restriction which it is difficult to observe, and breaks the restriction in the course of the work, I have no doubt that the master is liable in trespass. The master, in such a case, has a right to expect only ordinary, not extraordinary care from the servant. Therefore, if the servant uses ordinary care in carrying the master's order into execution, and yet an injury is done to a third person, the master is liable in trespass for that injury; but if the injury arise from the want of ordinary care in the servant, the master is liable only in case. Here the servant did use ordinary care in executing the master's order, and yet the rubbish ran against the plaintiff's wall, for which the defendant is liable in trespass.

PARKE, J.—I am of the same opinion. If but a single stone had been put against the wall, it would have been a trespass. *Stubbings* said, that he was ordered not to let the rubbish touch the wall; but he also said, that it was natural and unavoidable that some of the rubbish should roll against the wall. The defendant must be taken to have contemplated all the probable consequences of the act which he had ordered to be done, one of which was, that the rubbish would touch the plaintiff's wall. That being so, the laying the rubbish against the wall was as much the act of the defendant as if he had expressly ordered it to be done.

Rule discharged (a).

(a) In this case it seems to have been assumed, that if the defendant had himself done the wrongful act, he would have been liable in trespass; yet the laying of the rubbish at a distance of five feet from the plaintiff's wall would appear

to have been only the *remote* cause of the injury sustained, the *proximate* cause being the *subsequent* drying of the rubbish by a natural process. Vide *Reynolds v. Clarke*, 1 Stra. 634; Fortescue, 212; 8 Mod. 272, S. C.

# CASES

ARGUED AND DETERMINED

IN THE

**COURT OF KING'S BENCH,**

IN

**TRINITY TERM,**

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

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## MEMORANDA.

IN the course of the last vacation, Sir *William Draper Best*, Knight, resigned the office of Chief Justice of the Court of Common Pleas, which he had held since Hilary vacation, 1824, and was created a Peer by the title of Baron *Wynford*, of Wynford Eagle, in the county of Dorset. He was succeeded by Sir *Nicolas Conyngham Tindal*, Knight, His Majesty's Solicitor General, who was called to the degree of Serjeant, giving rings with the motto, "Quid leges sine moribus?", and took his seat on the first day of this term.

Sir *Charles Wetherell*, Knight, resigned the office of Attorney General to His Majesty, and was again succeeded by Sir *James Scarlett*, Knight.

*Edward Burtenshaw Sugden*, of Lincoln's Inn, Esquire, was appointed Solicitor General to His Majesty, in the room of Sir *Nicolas Conyngham Tindal*, Knight, and received the honour of knighthood.

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MARSH and others, Assignees of the Estate and Effects of  
JOSHUA ROWE, a Bankrupt, v. WOOD and another.

Where *A.* and *B.* submit a dispute to the arbitrament of *C.*, and before any award *A.* becomes bankrupt, and all his interest in the subject-matter of the dispute is vested in *C.* and *D.*, his assignees, *B.* may lawfully revoke the submission.

Whether the submission is revoked *ipso facto* by the bankruptcy and assignment, *quære.*

**COVENANT.** The declaration stated, that before the bankruptcy, to wit, on the 1st of May, 1822, at &c., by a certain indenture between defendants and *Rowe*, after reciting that *Rowe* alleged that he was entitled to charge defendants, or one of them, the loss, or some part or share of the loss, which had arisen to him by or in consequence of the purchase of three ships of war, called *el Firme*, *el San Nicolas*, and *el San Isidro*, in or about November, 1814, which defendants wholly disputed; and that there were other differences and disputes between defendants and *Rowe* respecting the said ships; all which differences and disputes the parties had agreed to refer to such person as arbitrator, and in such manner as therein mentioned; the parties thereto covenanted with each other and every of them, that they, their heirs, &c. should stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, final end and determination of *William Selwyn*, Esq. of, upon, and concerning the said disputes and differences, and also of and concerning the costs, charges, and expenses of the said references and award, to be made and published, as therein mentioned; and should and would in all things aid and assist the arbitrator in the business of the said reference, and would not in any manner, by affected delay or absence, or otherwise, obstruct, hinder, or impede the arbitrator in proceeding in the reference or making an award. Averment: that the arbitrator entered upon the reference; that *Rowe* and defendants from time to time attended before the arbitrator; that *Rowe*, on those occasions, produced before the arbitrator certain evidences, to wit, divers vouchers, proofs, and witnesses, tending to support *Rowe's* case and claim; that after the making of the indenture, and before the expiration of the time for making the said award, and after the production by *Rowe* of the said evidences, the defendants, by a certain deed sealed and

delivered by them respectively, *declared the said reference and submission, and the said indenture, and every covenant therein, absolutely determined and made void; and that they would not be bound by any proceedings which had taken place, or which might thereafter take place, or might be attempted to be taken, under colour or by virtue thereof, or of any of them; and they did thereby give notice to the said William Selwyn, and to all other persons whom it might concern, accordingly; and they did particularly thereby give the said William Selwyn notice not to proceed further in the matter of the said reference, or to allow any further proceedings to be taken before him in the said matter; and they did thereby revoke and absolutely determine the said reference and submission and the said indenture, and every covenant, &c. contained therein.* Of which deed the arbitrator had notice. Whereby the authority and power of the arbitrator, in respect of the premises, became and was wholly ended and determined, to wit, at &c. *Averment, that defendants did obstruct, hinder, and impede the arbitrator in proceeding in the said reference and making an award, contrary, &c.* *Averment, that Rowe and the plaintiffs, by means of the premises, not only lost and were deprived of all the benefits which would have arisen to Rowe before the bankruptcy or to the plaintiffs as assignees, since that time, from the award of the said William Selwyn, and from the ending and determination of the said disputes and differences, but that Rowe, before the bankruptcy, and plaintiffs as assignees since that time, necessarily and unavoidably were put to great expense in attending the reference and conducting the same, and in and about procuring and producing, and endeavouring &c. the vouchers, proofs, and witnesses for the necessary purposes of the said reference, and in and about the other expenses attending the same, amounting in the whole to a large sum of money, to wit, 5000*l.* of lawful money, &c.*

The second count differed from the first, in omitting the passages in italics. Plea, first, *non est factum*; secondly, that after the making of the indenture in the first count

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first mentioned, and before the making of the deed in that count secondly mentioned, and after the making the indenture in the second count first mentioned, and before the making of the deed in that count secondly mentioned, and before the said *William Selwyn* made or published any award, order &c.; of, upon, or concerning the said disputes and differences, or any of them, or of or concerning any of the matters or things in or by the said indentures, or either of them, submitted to the arbitration, &c. of the said *William Selwyn*, to wit, 1st January, 1824, at &c., *Rowe* became, and was duly declared and adjudged, a bankrupt, according &c. Verification, and prayer of judgment. Thirdly, that *Rowe*, before the making of the said several indentures in the first and second counts of the declaration mentioned, to wit, on the 21st of January, 1824, and from thence continually until the suing out of the commission of bankrupt therein mentioned, was a merchant, dealer, and chapman. The plea then went on to state the trading, the petitioning creditor's debt, and that after the making of the said indentures, and before the making of the deeds poll, and before the said *William Selwyn* had made or published any award, order &c., of, for, or concerning &c., to wit, on &c., at &c., *Rowe* became bankrupt within the true intent &c.; whereupon afterwards and before the making of the deeds poll, and before the said *William Selwyn* had made or published any award &c., of, upon, or concerning &c., to wit, the 22d of January, 1824, at &c., a commission of bankrupt issued against *Rowe*, directed &c., whereby &c., by virtue of which commission the major part of the commissioners afterwards, and before the making of the deeds poll, and before the said *William Selwyn* had made or published any award &c., found that *Rowe* had become a bankrupt within &c., and did then and there declare and adjudge him to be a bankrupt accordingly. Averment, that afterwards, and before the making of the deeds poll, and before the said *William Selwyn* had made and published any award &c., to wit, the 23d of January, 1824, *Rowe* remain-

ing a bankrupt, three of the commissioners, by indenture between them and *Charles Cutten*, the provisional assignee, ordered, bargained, sold, disposed, assigned and set over to *Cutten*, *inter alia*, all claim, right, interest or demand whatsoever of or belonging to *Rowe*, in or concerning all and every the said matters or things in dispute or difference between *Rowe* and the defendants, in trust for the immediate preservation thereof, and to and for the use and benefit of all the creditors of *Rowe* who then had sought, or who thereafter should in due time come in and seek relief, by virtue of the said commission. Verification, and prayer of judgment. Replication to the last plea, that after the making of the indenture between the commissioners and *Cutten*, to wit, on the 14th of February, 1824, plaintiffs, at a meeting of the major part of the commissioners at the Court of Commissioners, Basinghall-street, in the city of London, pursuant to notice in the London Gazette for that purpose given, were, by the major part in value of the creditors of *Rowe* then present, and who had proved their debts under the commission, and whose debts respectively amounted to 10*l.* or upwards, duly nominated, elected, and chosen, to be assignees of the estate and effects of *Rowe*. The replication then stated the assignment from the provisional assignee and the commissioners to the plaintiffs. Verification, and prayer of judgment. To the defendants' second plea the plaintiffs demurred, assigning the following causes of demurrer: first, that the plea does not state that *Rowe* was a trader within, &c.; secondly, that it does not state that *Rowe* owed any debt or debts upon which a commission could legally issue; thirdly, that it does not state that any commission of bankrupt was awarded or issued against *Rowe*; fourthly, that it does not state that any commission of bankrupt was awarded or issued against *Rowe* upon the petition of any person or persons to whom *Rowe* was indebted.

The defendants demurred generally to the plaintiffs' replication to the third plea, and joined in the plaintiffs'

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demurrer to their second plea; the plaintiffs joined in the defendants' demurrer to their replication to the second plea (a).

*Follett*, for the defendants (b). The defendants were justified in the course which they have taken. First, the bankruptcy was of itself a revocation; and as this fact appears upon the pleas, and is admitted by the replication, the defendants are entitled to judgment independently of the deed poll. Unless the submission be binding upon all parties, it is void in toto, *Ferrer v. Oven* (c), and the cases there cited (d). If, therefore, any thing arise subsequently to the submission to render an award incapable of being enforced against some of the parties, the submission is at an end. This has been held with reference to the death, 1 Roll Abr. *Authority B.*, Sir W. Jones, 388, (e) of one of the parties, and to the marriage, *Saccum v. Norton* (f),

(a) The marginal notes in the demurrer books were as follow:

"The plaintiffs contend that the defendants' second plea is bad, as not setting forth specially the act of bankruptcy, trading, and adjudication of bankruptcy.

The defendants contend that such several facts being within the peculiar information of the plaintiffs as assignees, should not be set forth specially by them, and that a general plea of the bankruptcy of *Rowe* is sufficiently well pleaded in an action at the suit of his assignees.

"The defendants contend that the matters pleaded in the last plea revoked the submission to arbitration, and that therefore the replication to that plea is bad. Or, if they did not amount to a revocation, the revocation made in consequence of the bankruptcy, which was a justifiable cause for the actual revocation, was no

breach of the covenant 'not to obstruct, hinder, or impede the arbitrator, by affected delay or otherwise'."

(b) Where there are cross issues or cross demurrers, it is the privilege of the plaintiff to begin: besides which, the only question here was, as to the sufficiency of the pleas, which the plaintiffs were bound to impugn before the defendant could be required to support them. It would therefore seem that the plaintiffs' counsel was entitled to begin.

(c) *Ante*, i. 222; 7 B. & C. 427. And see *Head v. Diggon*, *ante*, iii. 97, *ibid.* 100, (b).

(d) *Dilly v. Polhill*, 2 Stra. 923; *Antram v. Chace*, 15 East, 209; *Biddell v. Dowse*, 6 B. & C. 255.

(e) *Anon.*

(f) 2 Keble, 865. And see *Toussaint v. Hartop*, 7 Taunt. 571; *Potts v. Ward*, 1 Marsh. 366.

*Charnley v. Winstanley* (a), of a party who is a feme sole. Here the bankrupt has ceased to have any title to or interest in the matters submitted, and the authority of the arbitrator necessarily ceases with the interest out of which it is derived. An award made after the bankruptcy would not bind the assignees, *Kemshead ex parte* (b). The defendants, therefore, would have no means of enforcing an award if made in their favour, nor, if made against them, would it protect them from any further claim in respect of the matters submitted, which the assignees might think proper to set up, *Hooill v. Lethwaite* (c), *Hudson v. Granger* (d). Secondly, the defendants were justified in revoking the submission, supposing it not to have been already determined, inasmuch as any award made after the bankruptcy would have been nugatory. *Andrews v. Palmer* (e) can be supported only on the ground, that as a verdict had there been taken before the bankruptcy, the award that was to be substituted for the nominal verdict would have reference to the time at which that verdict was pronounced. Thirdly, the pleas shew that the plaintiffs had no right of action, inasmuch as the contract entered into by the bankrupt with the defendants, to refer these disputes and differences, did not pass to the assignees, such contract forming no part of the bankrupt's estate either as property or as a debt; which differs this case from that of *Smith v. Coffin* (f).

*R. V. Richards*, contra. Though the marriage of a feme sole will operate as a revocation of the submission to arbitration, it gives the opposite party a right of action against her and her husband, *Charnley v. Winstanley* (g), it being the voluntary act of the party. Here, if the Court should hold the bankruptcy to be a revocation of the submission,

(a) 5 East, 266; 1 Smith, 433.  
And see *Hartford v. Mattingley*,  
2 Chan. Rep. 117; Com. Dig.  
*Arbitrament*, D. 5.

(b) 1 Rose, 149.

(c) 5 Esp. N P. C. 158.

(d) 5 B. & A. 27.

(e) 4 B. & A. 250.

(f) 2 H. Bla. 444.

(g) 5 East, 266; 1 Smith, 433.

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the bankrupt will have been guilty of a breach of covenant, by reason of the issuing of the commission of bankrupt; which is a proceeding *in invitum*. The effect of the bankruptcy in depriving the bankrupt of all control over the property which formed the subject-matter of the reference, was urged without success in *Palmer v. Andrews* (a); and there, though the submission was by order of *Nisi Prius*, that order had derived its efficacy solely from the agreement of the parties. So, in *Haswell v. Thorogood* (b), the Court granted an attachment, although the party had become bankrupt before the costs awarded had been taxed. The change of circumstances alone cannot operate as a revocation; if it could, a mere assignment by a man of all his property would so operate.

*Follett*, in reply. In *Haswell v. Thorogood* this point was not made. The Court may uphold *Palmer v. Andrews* without deciding this case against the defendants.

LORD TENTERDEN, C. J.—Without deciding that bankruptcy is of itself a revocation of a submission to arbitration, the pleadings in this case shew that all *Rowe's* interest in the matters in dispute was vested in the assignees, who would not have been bound by the award. The defendants, therefore, ought not to be bound. Where the original submission is not binding on all the parties, it binds none; and upon the same principle, if, by matter arising subsequently, the submission ceases to be binding upon one of the parties, it is void in toto.

BAYLEY, J.—If the bankruptcy of one of the parties render it impossible that the award should bring the matters in dispute to that final settlement which it was the object of the reference to bring about, the other party is justified in putting an end to the arbitration. Here *Rowe's* claims

(a) 4 B. & A. 250.

(b) 7 B. & C. 705. In that case,

however, the award was made before the bankruptcy.

were transferred to his assignees, upon whom the submission was not binding.

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LITLEDALE, J.—The mutuality of the submission was destroyed by the assignment of *Rowe's* interest in the subject-matter. The defendants were therefore justified in putting an end to the reference. This is like the non-performance of a condition occasioned by the default of the other party.

PARKE, J., was at Guildhall.

Judgment for the defendants (a) on the second demurrer, for the plaintiffs on the first demurrer.

(a) It was attempted to be shewn (*ante*, 509,) that a decision in favour of the defendants in this case might be reconciled with the judgment of the Court in *Pulmer v. Andrews*, by connecting the award with the nominal verdict which had been taken before the bankruptcy. It is, however, clear that an express revocation could not


have been over-reached by any fictitious relation of the award to the verdict which it re-modelled; and it would seem to be unreasonable to hold that an implied revocation, by bankruptcy and assignment, should be so over-reached, unless the fiction would bind the assets of the bankrupt.

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*A.* signs a prospectus of a joint-stock distillery company, the general import of which is, that a company shall be thereafter formed; but which speaks of "the conditions upon which this establishment is formed." *A.* never pays his subscription. *A.* is not liable as a partner to pay for goods supplied to the distillery by a person who knew he had signed the prospectus; although *A.* was present when premises were taken for the distillery, and solicited persons to become subscribers.

**ASSUMPSIT** for goods sold and delivered. Plea, non assumpsit; and issue thereon. At the trial before *Hullock*, B. at the Lancashire Spring Assizes, 1828, the case was this:—The action was brought to recover the price of 345 quarters of malt sold and delivered in August, 1826, by the plaintiff to one *Langley*, who conducted a concern called the Hunter-Street Distillery at Liverpool. The question was whether the defendant had rendered himself liable as a partner in that concern. In the early part of the year 1825 Sir *William Fairlie* occupied an estate at Maghull, called Broadwood, seven miles from Liverpool, and believing that the legislature were about to pass an act for allowing the distillation of whiskey in England, he entertained the notion of forming a company for that purpose, and of carrying on the business at Broadwood; and in March, 1825, the following prospectus was issued:—"As the legislature has now authorised the distilling of whiskey in England, a company is proposed to be formed near Liverpool for that purpose, and to get a man from Inverness-shire to distil, in the small still, the spirit in the way practised at Ferintosh and Glenlivet, so that the quality, not the quantity, will be the basis on which the company pledge themselves to make their whiskey. The concern to be divided into forty shares of 100*l.* each, one-half of which the gentlemen who conduct the work will take. The other twenty shares will be filled up by subscribers. Subscribers to pay in their money to Messrs. *Moss* and Co., bankers, Liverpool, on account of the Maghull Distillery Company, by the first of May." This prospectus was signed by Sir *William Fairlie*, by the defendant, and by some other persons. The act of parliament alluded to in the prospectus passed on the 27th of June, 1825, but was not to come into operation until January, 1826; and it prohibited all persons from carrying on any distillery at any greater distance than a quarter of a

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mile from a market town. On the 20th of May Sir *William Fairlie*, the defendant, and two other persons who had signed the first prospectus, had a meeting at Liverpool, when a second prospectus was prepared, which was signed by all the four persons then present, and afterwards by others, and was couched in the following terms:—"As the legislature has authorised the distilling of whiskey in England, to commence on the 10th of October next, and has limited the situation of those distilleries to within a quarter of a mile of a market town, the distillery company forming at Maghull will necessarily have to occupy premises within that distance of Liverpool. The conditions upon which this establishment is formed are—First, they pledge themselves they will distil nothing but the purest malt spirit, in the smallest stills that government will license, and on the same plan practised in the highlands of Scotland, for which purpose an eminent distiller from Inverness-shire will be engaged. Secondly, the concern will be divided into twenty shares of 100*l.* each, which are transferable, five of which belong to Sir *William Fairlie*, Bart., the founder of the works, the other fifteen subscribers to pay their subscriptions to Messrs. *Moss and Co.*, bankers, Liverpool, in such proportions as may be called for. Thirdly, the concern to be under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October. Fourthly, regular books to be kept, which shall be open for inspection of any of the subscribers, and a division of the profits made twice a year, at Ladyday and Michaelmas. Fifthly, ten per cent. to be paid into the bank, on or before the 1st of June next." At this meeting it was proposed that the premises in Hunter Street should be taken, and it did not appear that the defendant objected to the proposal. At this meeting it was also agreed that the parties present should solicit persons of respectability at Liverpool to become shareholders. Subsequently, Sir *William Fairlie* inclosed a copy of the prospectus in a letter to the defendant, of which the following is a copy:—



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"I inclose the prospectus. If *Lord Blayney* and *Sir John Tobin* take shares, let them subscribe it: it is then full. I have directed a copy of the new act (when filled up) to be sent to me to your care, which you will take care of. *Mr. J. Drinkwater* wished to see it."

To this the defendant sent the following answer, dated the 24th of May, 1825:—

"I should have written to you before, but *Sir John Tobin's* having been absent for the last few days prevented me. I was with him this morning, and shewed him the prospectus; but he seemed not to think much of it, and declined becoming a shareholder; so I am afraid his reluctance will deter *Lord Blayney*, who will be here about the beginning of next week. I had some conversation with *Mr. John Richardson* upon it; however, he does not appear to think it will answer, on account chiefly of the trouble the excise at Liverpool give to all concerns of this nature. Not being a judge and totally unacquainted, I cannot give an opinion. On your return all parties must lay their heads together. *J. Drinkwater* I have not seen."

In June, 1825, a person named *Murray* was employed by *Sir William Fairlie* to conduct the distillery, and the names of *Murray* and Co. were affixed to the premises. In that month, *Sutherland* and Co., who were brass-founders at Liverpool, were employed by *Sir William Fairlie* to fit up the distillery, and he shewed them the two prospectuses signed by the defendant. To the second prospectus there were subscribed the names of ten persons, including those of *Sir William Fairlie*, and the defendant. On the 30th of June, 1825, *Sir William Fairlie* sent to the defendant a circular letter, of which the following is a copy:—

"As *Mr. Wm. Murray*, distiller, has taken the premises to fit up the same for commencing distilling whiskey, agreeably to the prospectus, of which you are a shareholder, upon the 10th of October next, it will be necessary for you

to pay in the amount of your subscription, 100*l.*, to Messrs. *Moss and Co.*, on or before the 1st of August next, on his account, to enable him to complete the arrangements necessary: the receipts will be left at the bank."

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With this circular he also sent the following letter:—

" I annex a circular, and congratulate you that Mr. *Murray* has undertaken the management, as we could not have found a more fit person to conduct it with every prospect of advantage. He has stipulated that all the subscriptions shall be paid in full by the 1st of August, and, failing that being done, he is to have the shares forfeited. No more than 100*l.* will be required from any of the subscribers, and there is every reason to expect the profits will be handsome, of which you will be entitled to a twentieth share."

On the 25th of August, 1825, a gentleman named *Edmonds*, by direction of the defendant, wrote to Sir *William Fairlie* a letter, from which the following is an extract:—

" With respect to the subscription for the distillery, General *Freeth* requested me to say, that the notice was so short from the time he received your letter, forwarded by me, to the period mentioned by which the shares were to be forfeited, it was out of his power, from unforeseen causes, to lodge the amount within the time prescribed."

Not one of the persons who signed the prospectus paid their subscriptions. In December, 1825, a person named *Langley* was engaged to conduct the business, and then the names of *Langley and Co.* were affixed to the premises. *Langley* being desirous of purchasing malt of the plaintiff, gave him a reference to *Sutherland and Co.*, who informed him that all the persons who had subscribed the second prospectus, including the defendant, were partners. This being the plaintiff's case, it was contended on the part of the defendant that he was not liable as a partner. First, that he was not an actual partner, entitled to share in the profits of the concern, if it had produced any, because he

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had never paid the subscription, the payment of which was necessary to entitle him to share in those profits. Secondly, that the mere signing of the prospectus was not an act by which the defendant had held himself out to the world as a partner—that prospectus, as was apparent from the terms of it, was nothing more than a proposal for a partnership to be formed at a future time, upon certain conditions—the proposed partnership was not to commence until a certain capital was raised—the prospectus was merely a proposal to form a partnership, if other subscribers could be obtained and a capital of 2000*l.* could be raised. It could not fairly be inferred from the prospectus that the defendant intended to pledge his credit as a partner until the whole capital had been raised. The learned judge inclined to the opinion that the defendant had rendered himself liable as a partner by the act of signing the prospectus; but he reserved the point for the consideration of the Court. The defendant then went into his case and endeavoured to prove that, even conceding that there had been a partnership, he had put an end to it before the goods were supplied by the plaintiff. For this purpose, *Edmonds*, who had by the defendant's desire written to Sir *William Fairlie* the letter of the 25th of August, 1825, was called as a witness. He stated that he had subsequently had a conversation with Sir *William Fairlie* upon the subject of the letter, in the course of which the latter expressed his regret that the defendant had declined having any concern in the distillery. Upon this, the learned judge left it to the jury to say whether, supposing the defendant to have been at one time a partner, he had done any thing to put an end to the partnership; and they found that “the defendant had never abandoned the concern or his liability under the prospectus.” A verdict was then taken for the plaintiff subject to the point reserved, upon which the defendant had leave to move for a nonsuit; and a rule nisi having been obtained accordingly,

*F. Pollock, Starkie, and Alderson*, now shewed cause.

There can be no doubt that certain persons entered into a partnership to carry on the distillery; the only question is, whether the defendant was one of those persons. [Lord *Tenterden*, C. J. Before you can charge the defendant as a partner, you must shew either that he was an actual partner, entitled to share the profit and liable to contribute to the loss, or that he held himself out to the world as a partner, and gave the partnership the credit of his name.] Then, first, the defendant was an actual partner. The business of the distillery commenced before the whole of the intended capital had been raised, and if any profits had been realised, the defendant would have been entitled to share them rateably with the other subscribers. But if this be doubtful, secondly, at all events the defendant held himself out to the world as a partner, by subscribing the prospectus. The fair and obvious inference to be drawn from the language of the prospectus was, that a partnership had been already formed by and among the persons who had subscribed the prospectus, for it states that "the conditions upon which this establishment is *formed* are," so and so. The defendant was present at the meeting when it was proposed that the premises in Hunter Street should be taken; he made no objection to that proposal; he solicited other persons to become subscribers. The prospectus was the only instrument executed, and any tradesman seeing that the business was carried on in the name of the company, and learning that the defendant and other persons had subscribed the prospectus, might reasonably regard those persons as the principals, and consider himself safe in giving them credit. The late case of *Vice v. Lady Anson* (a) will probably be cited on the part of the defendant, but that is distinguishable from the present. There the defendant was not an original subscriber, and the plaintiff, when he supplied the goods, had no reason to believe that the defendant had any interest in the mine. Here the defendant was an original

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(a) 1 M. & R. 113; 7 B. & C. 409.

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subscriber, and that fact was known to the plaintiff when he supplied the goods. There are other cases strong in favour of the plaintiff. In *Perring v. Hone* (a) the plaintiff's name was entered in a book with those of several other subscribers to a projected joint stock company. The plaintiff received certain scrip receipts, but sold them before the deed for the formation of the company was executed, and he was not a party to that deed. It was held, nevertheless, that he was a partner in the concern. [Bayley, J. The ground of that decision was, that Sir John Perring had not sold his shares in the mode prescribed by the deed, and that he therefore continued to be the holder of them.] In *Lawler v. Kershaw* (b) it was held by Lord Tenterden, at Nisi Prius, that a party paying a deposit on shares in a trading company, and afterwards signing the deed of partnership, was to be considered as a partner from the time of his paying the deposit.

*J. Williams and Patteson*, contra, were stopped by the Court.

LORD TENTERDEN, C.J.—I am of opinion that the defendant in this case was not a partner as between him and the other persons who proposed being members of the company, whoever they might be. That follows from the letter of the 25th of August, 1825, which was written by the authority of the defendant. But I agree that although he might not be actually a partner, still if he held himself out to the world as a partner, he is liable as such. The question, therefore, is, did he hold himself out to the world as a partner? That depends entirely upon the effect to be given to the prospectus which he signed. That instrument indicates that a company was about to be formed, not that one was actually formed, for it begins by speaking of “the distillery company *forming* at Maghull.” It has been urged that the subsequent words, “the conditions upon which


(a) 4 Bingh. 28.

(b) 1 M. &amp; M. 93.

this establishment *is formed, are,*" so and so, indicate that a company had been already actually formed; and, taken by themselves, those words undoubtedly might bear that import. But the remaining parts of the prospectus, as well as the preceding words to which I have already alluded, clearly imply, that the company was to be formed thereafter. It goes on, "the concern *will be* divided into twenty shares of 100*l.* each, which are transferable, five of which belong to Sir William Fairlie, Bart., the founder of the works, the other fifteen subscribers to pay in their subscriptions to Messrs. Moss & Co., bankers, Liverpool, in such proportions as may be called for. The concern *to be* under the management of a committee of three of the subscribers, to be chosen annually on the 10th of October. Ten per cent. to be paid into the Bank on or before the 1st of June next." The defendant, therefore, has signed a paper, the import of which is, that a company was to be formed thereafter; and his having signed that paper cannot indicate to any person who reads it that he has become a member of a company already formed. He has not, therefore, held himself out to the world as a partner in a company already formed, and he is not liable in this action. The rule for entering a nonsuit must consequently be made absolute.

BAYLEY, J.—I am also of opinion that a nonsuit must be entered in this case. In order to be chargeable as a partner, a man must either be actually a partner, or must have done some act which justifies others in treating him as a partner. It is quite clear that the defendant in this case was not actually a partner; but it is contended that his signing the prospectus of the 20th of May, 1824, was an act which justified the plaintiff in treating him as a partner. If that prospectus imports that the person signing it was at the time a partner, in a company already formed, he would undoubtedly continue to be so until the partnership was legally dissolved; but the prospectus imports that something remained to be done before the company was to be

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formed, and not that it was formed already. Now the defendant certainly did not become a partner by means of any act done by him subsequently to his signing the prospectus. Almost immediately after signing, he writes, stating that he had shewn the prospectus to other persons who declined becoming members of the company. He never interferes again until August, 1825, when he writes, through the medium of Mr. *Edmonds*, stating that it had been out of his power to be able to lodge the amount of the subscription within the period by which the shares were to be forfeited. The merely seeing the defendant's name to the prospectus was therefore no ground for the plaintiff's presuming that he had become a partner at the time when he signed it. The plaintiff should have inquired, before he supplied the goods upon the defendant's credit, whether he had become a partner subsequently, and if he had so inquired, he would have found that he had not.

LITLEDAL, J.—I am also of the same opinion. The plaintiff supplied the goods, as he says, upon the credit of the defendant. The goods, however, were not ordered by the defendant, but by a third person, who could not bind the defendant without some authority, express or implied. It is said that he had an implied authority, because he was a partner, and one partner has an implied authority to bind another in partnership transactions. Still the question remains, was the defendant a partner? Now he could not be an actual partner unless there was a partnership actually formed; and it is quite clear that no partnership was ever actually formed between the defendant and those individuals who proposed to carry on the concern. It is said that the defendant held himself out to the world as a partner by the act of signing the prospectus. I think that is not so, because the act of signing the prospectus did not give authority to any person to carry on the business on his account. The same may be said of his letters. On the 28th of May he informs Sir *William Fairlie* that he had

solicited certain persons to become subscribers, who had declined so doing; and on the 23d of August, that he had been unable to pay the subscription, the payment of which was absolutely necessary to entitle him to a share of the profits, if there should be any. Neither of those letters shews that he gave authority to any person to carry on the business on his account. Then as the defendant did not, either by having actually become a partner, or by holding himself out to the world as a partner, give any implied authority to the person who ordered the goods of the plaintiff to bind him, he is not liable to pay for the goods.

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Rule absolute (a).

(a) *Parke, J.*, having been concerned in the cause when at the bar, gave no opinion.

HARRATT and another v. WISE.

**ASSUMPSIT** on a policy of insurance on goods on board the ship *Ann*, at and from Liverpool to Buenos Ayres. The loss was alleged to be by capture. Plea, non assumpsit; and issue thereon. At the trial before Lord *Tenterden*, C. J. at the London adjourned sittings after Trinity term, 1828, the case was this. The *Ann* sailed from Liverpool on the 4th of February, 1826, and having encountered bad weather and received much damage, put into Lochendale, one of the western isles of Scotland, on the 19th of February, to repair. She sailed from thence on the 12th of March, arrived off Monte Video in May, was there captured by the squadron then blockading Buenos Ayres, was carried into Monte Video, and from thence was sent to Rio Janeiro, where her cargo was taken out and put into the government stores. Notice of abandonment was given on the 6th of May, and refused. While the *Ann* lay at Lochendale some of the crew deserted, and the captain went to

If a ship, the cargo of which is insured, sails from a British port, and notice is afterwards given in the Gazette that the foreign port to which she is bound is blockaded, it is a question of fact for the jury, in an action upon the policy, the ship having been captured, whether the captain knew of the blockade or not.



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Greenock to procure other men, and was absent five days. The blockade of Buenos Ayres was notified in the London Gazette on the 18th of February. The insurance was effected on the 22d of that month. The mate, who was examined, denied any knowledge by himself, and, as far as he knew, by the captain, who was not examined, of the existing blockade, until the *Ann* came up with the blockading squadron, which was by night. A number of ships being observed there together, the captain dropped anchor, and remained till daylight, in order to obtain information, when the *Ann* was captured. Upon this evidence Lord *Tenterden* left it to the jury as a question of fact, whether the captain knew of the blockade before he sailed from Lochendale, directing them, if they thought that he did not, to find a verdict for the plaintiffs; and they found a verdict for the plaintiffs accordingly.

*Brougham*, in the succeeding term, obtained a rule nisi for a new trial, upon the ground that the voyage, being to a blockaded port, was illegal, and that the notice of the blockade in the Gazette was notice to all the king's subjects, and therefore that the captain, when he sailed from Lochendale, must be presumed to have known of the blockade. He cited the cases of *The Neptunus* (a), *The Adelaide* (b), and *The Shepherders* (c).

*Scarlett*, A. G., and *Tomlinson*, on a former day in this term shewed cause. First, the voyage was legal in its inception, because it commenced before the notification of the blockade. The insurance, therefore, was valid, because it was upon a legal voyage. Then, the voyage and the insurance being *prima facie* legal, no illegality of intention can be presumed on the part of the captain. Illegality in the insurance must be the consequence of illegality in the voyage. There is nothing illegal in effecting a policy on a ship after the insurer knows that she is sailing for a block-

(a) 2 Rob. Adm. R. 110. (b) Ib. 112, n. (c) 5 Ib. 262.

aded port. The policy may be good for the voyage, so long as the voyage remains legal, that is, so long as the captain is ignorant of the blockade, or, if the voyage is completed, while he so continues ignorant. The ship may commence her voyage for a blockaded port, and may find on her arrival that the blockade is at an end. She may founder at sea in the course of the voyage, before the captain knows of the blockade, in which case clearly the assured would be protected by the policy. Upon the same principle he is protected also where the vessel is captured by the blockading squadron, without any fault on the part of the captain. Secondly, the finding of the jury is conclusive of the fact, that the captain was ignorant of the blockade when he sailed from Lochendale. The doctrine laid down in the cases of *The Neptune* (a) and *The Adelaide* (b), namely, that from the moment a notification of a blockade is made to a government, it binds the subjects of that state, because it is supposed to circulate through the whole country, must be considered with reference to the particular facts of those cases, and the parties between whom they were decided. Those were decisions upon the question of the right of capture between the subjects of different states. It must be admitted that, as between nation and nation, notice to a government is notice to its subjects, that is, when a reasonable time has elapsed for the government to communicate such notice. But in a municipal court, where the parties are subjects of the same state, appearing in the respective characters of assured and underwriter, the fact of notice and of consequent illegality of intention is the very point in issue. As between such parties the policy operates as a general contract of indemnity against all risks incurred without any fault on the part of the assured. Besides, the rule that notice in the Gazette is notice to all the king's subjects, is a rule of presumption only, and in this case that presumption has been negatived by the finding of the jury—a finding well warranted by the evidence,

(a) 2 Rob. Adm. R. 110.

(b) Ib. 112, n.

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which satisfactorily established the absence of such notice in fact. The testimony of the mate, and the conduct of the captain upon falling in with the blockading squadron, completely rebutted the presumption of notice in this case. That being so, the case is relieved from the question whether, by the law of nations, the assured, having notice, might lawfully commence a voyage to the blockaded port, upon the chance of the blockade ceasing, regard being had to the distance, and to the unsettled and fluctuating condition of the country to which that port belonged: though if that question were raised, the case of *The Shepherdess* (a) seems to be an authority for answering it in the affirmative.

*Brougham*, contra. The voyage was illegal, therefore the policy is void. It is a settled rule of law that from the moment a notification of a blockade is made to a government, it binds the subjects of that state, because it is supposed to circulate through the whole country. In this case, therefore, the captain must be presumed to have known of the blockade at the time when he sailed from Lochendale; by no means a violent presumption, for he had been to Greenock and back, and was on shore for five days together. It is laid down in the case of *The Shepherdess* (a), that under such circumstances the act of sailing constitutes the offence, therefore the captain in this case was guilty of an offence against the law of nations when he sailed from Lochendale; the loss of the ship was the consequence of that offence; and such a loss the underwriters are not liable to make good.

The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J., who, after recapitulating the facts of the case, thus proceeded:—Upon this evidence it was contended, on the part of the defendant, both at nisi

(a) 5 Rob. Adm. R. 262.

prius and upon the motion for a new trial, that the voyage, being to a blockaded port, was illegal in its inception, and, that the policy was therefore void. Upon the discussion of the rule the same argument was urged, and it was further contended that as the captain had been at Lochendale and at Greenock after the time when the notification of the blockade might, and must be presumed to have reached those places, he must be presumed to have heard of it, and had avoided the policy by afterwards prosecuting the voyage; and the cases of *The Neptunus* (a), *The Adelaide* (b), and *The Shepherdess* (c), were cited. We are of opinion that it cannot be said that this voyage was illegal in its inception; because the actual commencement of the voyage was the ship's departure from Liverpool, which took place before the Gazette containing the notification of the blockade was published. Admitting that the blockading nation may, by the law of nations, be allowed to consider its notification of a blockade as notice thereof to all the subjects of the nation to which the notification has been made, for it cannot be expected that the blockading nation should be required, or would be able if required, to prove actual knowledge in the captain of every vessel of the other country, yet, such a rule, allowing it to prevail to the supposed extent, though it may be open to some qualification and relaxation for the furtherance of justice and the benefit of commerce, cannot, in our opinion, be applied to the case of insurance. And if the possibility, or even probability, of actual knowledge should be considered as legal proof of the fact of actual knowledge, as *præsumptio juris et de jure*, the presumption might, in some cases, be contrary to the fact, and such a rule might work injustice. We are, therefore, of opinion that such a rule cannot be established as a rule of insurance law; but that knowledge, like other matters, must become a question of fact for the deliberation and decision of a jury. The probability of actual knowledge, upon consideration of time, place, the opportu-

(a) 2 Rob. Adm. R. 110.

(b) *Ib.* 112, n.(c) 5 *Ib.* 262.

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nities of testimony, and other circumstances, may in some instances be so strong, as, in the opinion of the jury, fairly to cast proof of ignorance on the other side, and, in the absence of such proof, to lead them to infer knowledge; but still we think the inference, whichever way it may be drawn, ought to be drawn by a jury. In the case now before us, if the jury had drawn the other inference, we are not prepared to say that they would have done wrong. But we cannot say that they did wrong in declining to draw that inference, and therefore we cannot set aside their verdict. The rule for a new trial must, consequently, be discharged.

Rule discharged.

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Goods were insured at and from L. to any port in the river P. The policy was effected and the ship sailed after notification that those ports were blockaded. The ship was captured by the blockading squadron in the river P., but was rescued by her own crew, and brought back with the goods undamaged to L. Notice of abandonment was given in the interval between intelligence of the capture and of the rescue, but after the rescue in fact. There was no intention to violate the blockade. Held, that the voyage as insured was not illegal; but that there was not a total loss.

**ASSUMPSIT** on a policy of insurance, dated 6th March, 1826, on goods on board the ship *Monarch* at and from Liverpool to any port or place in the river Plate, with liberty, *in the event of a blockade or being ordered off the river Plate*, to proceed to any other port, and there wait or discharge. The loss was alleged to have been by capture. Plea, non assumpsit; and issue thereon. At the trial before Lord Tenterden, C. J. at the London adjourned sittings after Trinity term, 1828, the case was this:—The *Monarch* sailed from Liverpool on the voyage insured on the 11th of March, 1826, arrived in the river Plate on the 22d of May, and was captured by a Brazilian frigate on the 23d of May. She was detained and sent into Monte Video; and after remaining there a short time was sent to Rio Janeiro for adjudication, with the captain and some of the crew, a prize-master, and some soldiers and sailors of the Brazilian government. On her passage towards Rio Janeiro, on the

21st of July, the captain and crew rose upon the Brazilian people, overpowered them, and brought the ship and cargo back to Liverpool, where they arrived on the 20th of September. The captain there landed and warehoused the goods, but the plaintiffs never had possession of them. Verbal notice of abandonment was given to the defendant on the 28th of August, which he refused to accept. The fact of the rescue was not then known. The notification of the blockade of the ports in the river Plate belonging to the government of Buenos Ayres, by the Emperor of Brazil, was published in the London Gazette on the 18th of February, 1826. The action was commenced in Hilary term, 1827. It was contended on the part of the defendant, first, that the voyage was illegal, it being to a blockaded port after notification of the blockade; and, secondly, that there was not a total loss of the goods, they never having been taken out of the ship, but brought back in her to Liverpool. The Lord Chief Justice left it to the jury to say whether the captain intended to violate the blockade, and they said they were not satisfied that he did intend to violate the blockade. His lordship then directed a verdict to be entered for the plaintiffs, but gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that there was not a total loss.

In the succeeding term a rule nisi was granted in the alternative, for a nonsuit, on the ground that there was not a total loss; or for a new trial, on the ground that the voyage was illegal; against which, on a former day in this term,

*Campbell* and *R. C. Scarlett* shewed cause. The question whether there was any intention to violate the blockade, was a question of fact for the jury. It was left to them; and they found, substantially, that there was no such intention. That finding is consistent with law; for there was nothing illegal in the adventure, and the captain was entitled by the terms of the policy to sail to the river Plate, for the purpose of inquiring whether the blockade was still

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subsisting. There is no ground for saying that a policy so framed is void ab initio; for the blockaded ports were at a great distance, and there was a fair probability that the blockade would be suspended or determined by the time the ship arrived there. The voyage was not illegal, nor was the policy void; therefore there is no ground for granting a new trial. Neither is there any ground for entering a nonsuit; for there was clearly a total loss of the goods at the moment when the ship was first captured, and as soon as the assured heard of the capture, they were entitled, as they did, to give notice of abandonment to the underwriters, and to come upon them for a total loss. The goods were taken possession of by a superior force, and were never restored to the possession of the plaintiffs. It was held in *Holdsworth v. Wise* (a), and in *Parry v. Aberdeen* (b), that where a total loss of the goods has once accrued by the crew's desertion of the ship at sea, that cannot be converted into a partial loss by the subsequent restoration of the ship and goods. So here, it must be held that the total loss of the goods which accrued by the capture of the ship has not become a partial loss, or at all ceased to be a total loss, by the subsequent rescue of the ship and goods.

*Scarlett, A. G. and Alderson, contra.* First, the policy was void ab initio, because it was effected upon an illegal voyage, namely, a voyage to a blockaded port after notification had been published in the Gazette; and the vessel sailed on that voyage. The fact that there was no intention to violate the blockade is no answer to this objection; because the ship having been detained for the purpose of trying the question whether she had violated the blockade or not, it was the duty of the captain to have waited for an adjudication upon that question, instead of rescuing his ship, and thereby committing another offence against the law of nations. Even if his rescuing the ship was justifiable, his returning with her to Liverpool was not; for his duty was (a) 1 M. & R. 673; 7 B. & C. 794. (b) 4 M. & R. 343; 9 B. & C. 411.

to "proceed to some other port and there wait or discharge," according to the liberty reserved in the policy. Secondly, the plaintiffs had no right to claim for a total loss when they did, because they abandoned upon hearing of the capture, on the supposition that the ship was then in the hands of the captors, whereas she had in fact at that time been rescued, and was in the course of her voyage back to Liverpool. In *Hamilton v. Mendes* (a), Lord Mansfield said that the proposition advanced at the bar in the case of *Goss v. Withers* (b), "that in case of the ship being taken, the insured may demand as for a total loss, and abandon," was true, *provided* the capture, or the total loss occasioned thereby, continue to the time of abandoning *and* of bringing the action. *Bainbridge v. Neilson* (c) was decided upon the same principle; and it seems to have been there doubted, whether in any case, if that, which in its inception was a temporary total loss, turn out by subsequent events to be only a partial loss, before any action brought, the assured be entitled to insist on his notice to abandon given during the existence of such temporary total loss. In that case Lord Ellenborough described the effect of an offer of abandonment to be this:—"If it be made on supposed facts which turn out to be true, the assured has put himself in a condition to insist upon the abandonment; but it is not enough that it is properly made on facts which are supposed to exist at the time, if it turn out that no such facts existed." That decides the present case; because here the offer of abandonment was made upon the supposition that the vessel then remained in the hands of the captors; which turned out not to be the fact, for the ship and cargo had then been rescued, and were on their return to Liverpool, where they afterwards arrived, and continued at the time when the action was brought.

(a) 2 Burr. 1198.  
 (b) 2 Burr. 683, and acted upon by the bench; for the decision there is reported to have been that an insured ship being taken, the

insured may demand as for a total loss, and abandon to the insurer.

(c) 10 East, 329; 1 Campb. 237. Sed vide *Smith v. Robertson*, 2 Dow, 474; *post*, 532.

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The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J.—This was an action upon a policy of insurance dated the 6th of March, 1826, on goods by the ship *Monarch*, at and from Liverpool to any port or place in the River Plate, with liberty, in the event of a blockade, or being ordered off the River Plate, to proceed to any other port, and there wait or discharge. The loss was alleged to have been by capture. The cause was tried before me, and a verdict was found for the plaintiffs, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was not a total loss.

It appeared at the trial that the *Monarch* sailed from Liverpool on the voyage insured on the 11th of March, 1826, and was proceeding up the River Plate for Buenos Ayres, when she fell in with a Brazilian frigate below Monte Video, on the other side of the river, was detained and sent into Monte Video, and, after remaining there a short time, was sent from thence for Rio Janeiro for adjudication, with the original master and first and second mates, the steward, a lascar, another of her crew, who was examined as a witness at the trial, a prize-master, and several black and white soldiers and sailors. She sailed in company with several other vessels, but was separated from the convoy. Her own master and crew rose upon the others, overpowered them, bound and sent them all, except two, away in the long boat, and brought the ship and cargo back to Liverpool in September, where the master landed and warehoused the goods, and the plaintiffs had not had possession of them. In the interval between receiving intelligence of the capture and of the rescue, notice of abandonment was given, but not accepted. Notification of the blockade of the ports in the River Plate, belonging to the government of Buenos Ayres, by the Emperor of Brazil, was published in the London Gazette on the 18th of February, 1826. The jury said they were not satisfied

that the master intended to violate the blockade. It was contended on the part of the defendant, both at the trial and on the motion for a nonsuit, that the voyage, being to a blockaded port after notification of the blockade, was illegal in its commencement; and that there was not a total loss of the goods, which were bale goods, they having never been removed out of the ship, but brought back in her to Liverpool. When the motion came to be discussed, it was farther contended on the part of the defendant, that admitting there was no intention to violate the blockade, as found by the jury, the master ought to have waited for an adjudication; that his rescuing the ship was an act contrary to the law of nations, and avoided the policy; or, if not, that his returning to Liverpool, instead of proceeding to some other port, there to wait or discharge, according to the terms of the policy, avoided the policy.

We are of opinion that there is no ground for saying that the voyage as insured was illegal in its commencement. According to the opinion of Lord *Stowell*, in the case of *The Shepherdess* (a), the vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at Monte Video, or of any of the Brazilian ships met with in the River Plate; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the River Plate, and does not indicate any intention to violate the blockade.

It is not necessary to deliver any opinion upon the effect of the rescue or the return to Liverpool. The cases of *Anderson v. Wallis* (b), and *Holdsworth v. Wise* (c), are authorities to shew that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled,

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(a) 5 Rob. Adm. R. 262.

(c) 1 M. & R. 673; 7 B. & C.

(b) 2 M. & S. 240.

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does not constitute a total loss under a policy of insurance, unless by the aid and effect of an abandonment. In this case the goods have been brought back to Liverpool. It does not appear on what ground the master has detained them. If it be on the ground of a claim in the nature of salvage, the plaintiffs may obtain them by satisfying that claim. There is no proof that the goods are deteriorated. The particular adventure on which they were sent has, indeed, been defeated; but that fact will not, of itself, make the underwriters liable for a total loss. If the abandonment is to be viewed with reference to the ultimate state of facts, as appearing before the action was brought, then, according to the opinion of the Court in *Bainbridge v. Neilson* (a), there has not, for the reasons already given, been a total loss. We are aware that doubts were expressed by a very high authority in the case of *Smith v. Robertson* (b), of the propriety of the decision in *Bainbridge v. Neilson*. But, notwithstanding those doubts, the rule as laid down in *Bainbridge v. Neilson* was adopted and acted upon by the Court in the two subsequent cases of *Patterson v. Ritchie* (c) and *Brotherston v. Barber* (d); and we consider the point to have been well settled, and the rule properly established by those authorities. Our judgment, therefore, is, that the rule must be made absolute for entering a nonsuit.

Rule absolute for entering a nonsuit.

(a) 10 East, 329; 1 Campb. 237.

(b) 2 Dow, 474.

(c) 4 M. & S. 393.

(d) 5 M. & S. 418.

## GLASSPOOL v. YOUNG and others.

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**THIS** was an action of trover against the late sheriff of Surrey and his officers, for certain goods and chattels alleged to be the property of the plaintiff. Plea, not guilty; and issue thereon. At the trial before Lord *Tenterden*, C. J. at the London adjourned sittings after Trinity term, 1828, the case was this:—In 1823, the plaintiff, who was then a widow, intermarried with one *Mearing*, the goods in question being then her property. In 1824 judgment was entered up against *Mearing* on a warrant of attorney, and a writ of fieri facias was sued out, under the authority of which the defendants seized the goods in question, in a house where the plaintiff and *Mearing* were living together as husband and wife. *Mearing* moved the Court for a rule to set aside the judgment; and the plaintiff made an affidavit in support of the rule, in which she described herself as his wife. The rule was referred to the master, who directed that the judgment should stand. The defendants then sold the goods. Two years afterwards the plaintiff discovered, that at the time when she intermarried with *Mearing* he had another wife living, of which she gave notice to the defendants, and demanded restitution of her goods, which being refused, she brought the present action. It was contended on the part of the defendants, that they were justified in seizing the goods as *Mearing's*, inasmuch as the plaintiff was then living with him as his wife, and afterwards represented herself as his wife in her affidavit. Lord *Tenterden* told the jury, that if the goods belonged, not to *Mearing*, but to the plaintiff, at the time of the seizure, she was entitled to recover, unless something had since occurred to deprive her of her right; that if she had lived with *Mearing* as his wife, and represented herself to be so, knowing at the time that she was not so, she would not, perhaps, now be permitted to say that she was not then his wife; and his lordship left it to them to say whether, at the time of levying the execution and of making the affidavit, the plaintiff

A man and woman had been married, and were cohabiting together. Goods, which had belonged to the woman before the marriage, were seized and sold under an execution against the man. The woman afterwards discovered that the marriage was void:—Held, that she might recover in trover against the sheriff the full value of the goods, though exceeding the price for which they were sold.

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did or did not know that *Mearing* had another wife living; if not, he directed them to find a verdict for the plaintiff. The jury found a verdict for the plaintiff for the full value of the goods, which exceeded the sum for which they sold under the execution. Liberty was reserved to the defendants to move either to enter a nonsuit or to reduce the damages; and a rule nisi having been afterwards obtained accordingly,

*Gurney* and *Comyn* now shewed cause. The jury have by their finding negatived fraud, the existence of which alone could invalidate the plaintiff's right to the goods; it is clear, therefore, that she is entitled to recover. The goods were her's, and were seized for the debt of *Mearing*; therefore the case is the simple one of a sheriff being directed to seize the goods of one person, and by mistake seizing those of another, a mistake for which he must make compensation. At the time of the seizure the plaintiff believed that she was the wife of *Mearing*, and consequently that the goods were his, and, acting under that belief, she submitted to the seizure without resistance; but that cannot operate as an estoppel against her, or be considered as a consent on her part, because she was not then cognisant of the fact which alone gave her the right of resistance. *Edwards v. Bridges* (a) was a much stronger case than the present. There the plaintiff cohabited with one *Salmon*, and passed as his wife. A writ of fieri facias issued against his goods, and when the officer went to execute it, she represented herself to be his wife, but before the seizure and sale claimed the goods as her's; and although she had represented herself as the wife of *Salmon*, knowing that she was not so, she was held entitled to recover upon proving that the goods were her's. First, therefore, there is no ground for entering a nonsuit in this case; nor, secondly, is there any ground for reducing the damages; because, if the plaintiff is entitled to a verdict at

(a) 2 Stark. N.P.C. 396.

all, she is clearly entitled to a verdict for the full value of the property which has been unlawfully converted by the defendants.

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*Scarlett, A.G., and Coltman, contra.* First, the plaintiff is not entitled to recover at all. The present case is very distinguishable from that of *Edwards v. Bridges*. There the sheriff received notice before the goods were either sold or seized that they were the property of the plaintiff, and not of the party against whom the execution had issued; and notwithstanding that notice he wilfully took upon himself the risk of proving that the goods belonged, not to the plaintiff, but to the debtor. Here, the sheriff received no such notice; nor was there any thing to put him on his guard; on the contrary, the plaintiff held herself out as the wife of *Mearing* at the time when the execution went in, and continued to do so for two years after the execution was executed. Now, when the sheriff is deceived by the misrepresentation of a party as to a fact, his knowledge of which may influence his conduct, that party cannot turn round upon the sheriff and sue him for an error, of which he has himself been the cause. *Morgans v. Brydges (a)* is an authority for this position. There Lord *Ellenborough* said, "Where a party has misrepresented himself, and taken a name which does not belong to him, it is not permitted to him to take advantage of his own wrongful act, so as to enable him to avoid the consequences of it; for a mistake induced by his own affirmation cannot give him a right of action. I remember a case to this effect before Lord *Loughborough*, where a person had obtruded himself instead of another on the sheriff's officers, and afterwards, having been arrested, brought an action against them, and Lord *Loughborough* held that it would not lie. I dissented at the time from the decision, but on fuller consideration I have been satisfied that the case was rightly determined." *Mace v. Cadell (b)* is to the same effect, and that case was

(a) 1 B. & A. 647.

(b) Cowper, 232.

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mentioned with approbation by the Court of Common Pleas in *Edwards v. Farebrother* (a). As to the question of fraud, it is perfectly immaterial to the sheriff whether the representation made by the plaintiff was fraudulent or not; it was false, if not fraudulent, and equally had the effect of deceiving him (b). The sheriff is entitled to protection in all cases where he has no means of knowing what are the rights of the parties; and it makes no difference that the parties themselves did not know what their own rights were at the time when the sheriff acted. In the case of an execution irregularly issued, and afterwards set aside, the sheriff would be justified in having acted under it; *Coles v. Wright* (c); and there is the greater reason for holding the sheriff protected in this case, inasmuch as otherwise, without any fault on his part, he will be rendered liable for a loss, in respect of which he will have no remedy over against any person. Secondly, at all events the plaintiff is not entitled to recover in this form of action. This is an action of trover, to support which the plaintiff must shew, not only his own right of property, but a wrongful conversion by the defendant. Now it is not every intermeddling with the property of another that constitutes a wrongful conversion. Here, there was an intermeddling with the property of the plaintiff, but not a wrongful conversion of it, by the sheriff. The conduct of the plaintiff amounted to a licence to the defendants to sell; and though she might at any time have retracted that licence as against a wrong-doer, she cannot be allowed to do so for the purpose of casting a liability upon persons who were not wrong-doers. It is the same thing as if the supposed husband had sold these goods with her assent. Had an action of trespass been brought, the defendant might have pleaded licence. The plaintiff had been married to *Mearing* in fact, though the marriage was not valid in law. By that marriage she had given up her goods to her husband de facto; and when they were

Moore & P. 293. (b) *Vide post*, 538, (a). (c) 4 Taunt. 198.

seized and sold as *his* goods, she made no objection. Under such circumstances she ought not to be allowed to complain of the defendants as having wrongfully converted *her* goods. Thirdly, the verdict, if sustainable at all, is good only for damages to the amount of the sum realized by the sale of the goods; for it would surely be unjust to fix the defendants with the payment of the full value of goods, which produced at the sale little more than half their estimated value.

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Lord TENTERDEN, C. J.—I am of opinion that this rule must be discharged. It certainly may be hard upon the sheriff that he should be held liable in such a case as the present, where no misconduct can be imputed to him or to his officers; but I fear we should be laying down a bad precedent, if we were to break in upon an established rule of law merely on account of the hardship which attends its application in this particular case. It is a well established rule of law, that if by process the sheriff is directed to seize the goods of *A.*, and he takes those of *B.*, he is liable to be sued in trover for them. We must not enter into a discussion of the particular circumstances of each case; it is better to abide by the general rule of law. But it was said that the plaintiff having looked on and submitted, having seen the goods removed without expressing any dissent, could not recover. The case was compared by the Attorney-General to that of a sale made with her assent by the supposed husband, as in *Morgans v. Brydges*(*a*). That was a very different case from the present. An execution is a proceeding *in invitum*; and the plaintiff in this case acquiesced because she did not then know that she had the power to resist, though she afterwards discovered her error. The case, therefore, comes simply to this, that the defendants took by mistake goods which in fact and in law belonged to the plaintiff. The plaintiff is not bound by the price which the goods fetched in a sale of this kind.

(*a*) 1 B. & A. 647.



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mentioned with approbation by the Court of Common Pleas in *Edwards v. Farebrother* (a). As to the question of fraud, it is perfectly immaterial to the sheriff whether the representation made by the plaintiff was fraudulent or not; it was false, if not fraudulent, and equally had the effect of deceiving him (b). The sheriff is entitled to protection in all cases where he has no means of knowing what are the rights of the parties; and it makes no difference that the parties themselves did not know what their own rights were at the time when the sheriff acted. In the case of an execution irregularly issued, and afterwards set aside, the sheriff would be justified in having acted under it; *Coles v. Wright* (c); and there is the greater reason for holding the sheriff protected in this case, inasmuch as otherwise, without any fault on his part, he will be rendered liable for a loss, in respect of which he will have no remedy over against any person. Secondly, at all events the plaintiff is not entitled to recover in this form of action. This is an action of trover, to support which the plaintiff must shew, not only his own right of property, but a wrongful conversion by the defendant. Now it is not every intermeddling with the property of another that constitutes a wrongful conversion. Here, there was an intermeddling with the property of the plaintiff, but not a wrongful conversion of it, by the sheriff. The conduct of the plaintiff amounted to a licence to the defendants to sell; and though she might at any time have retracted that licence as against a wrong-doer, she cannot be allowed to do so for the purpose of casting a liability upon persons who were not wrong-doers. It is the same thing as if the supposed husband had sold these goods with her assent. Had an action of trespass been brought, the defendant might have pleaded licence. The plaintiff had been married to *Mearing* in fact, though the marriage was not valid in law. By that marriage she had given the goods to her husband de facto; and when

(a) 2 Moore & P. 293. (b) *Vide post*, 538, (a).

who was a broker, had purchased for the plaintiff fifty shares in the Continental Gas Company, representing to him at the time of the purchase that 8*l.* per share had been already paid upon those shares, whereas in truth only 5*l.* per share had been paid. The action was brought to recover the remaining 3*l.* per share. The plaintiff tendered in evidence an unstamped note, signed by the defendant, and in the following terms:—"Bought for Mr. *Tomkins* fifty Continental Gas shares, at 2*l.* premium, (8*l.* already paid) 500*l.*; commission 6*l.* 5*s.*—506*l.* 5*s.*" It was objected on the part of the defendant that this note could not be received in evidence for want of a stamp, inasmuch as it was a memorandum of a contract, *not* for the sale of goods, wares, and merchandizes, and, therefore, required to be stamped by the 55 *Geo.* 3, c. 184, Sched. Part I. In reply it was contended, that the note was nothing more than an account furnished by a broker to his principal, and was analogous to brokers' notes upon sales of stock. The Lord Chief Justice received the evidence, but gave the defendant leave to move to enter a nonsuit, if the verdict should be against him. The jury having found for the plaintiff, and a rule nisi having afterwards been obtained for a nonsuit, on the ground that the note was improperly received in evidence, or for a new trial, on the ground that the verdict was against evidence,

*Gurney* and *Comyu* now shewed cause. The note required no stamp, and was properly received in evidence. The cause of action did not arise out of the note itself, or out of any contract of which it could be evidence. The action was brought to recover money due to the plaintiff by means of an implied contract proceeding from the fact of the defendant's having received that money for the use of the plaintiff. The note was produced in evidence merely for the purpose of proving the representation made by the defendant that 8*l.* per share had been paid; and the facts that on the faith of that representation he had received 8*l.* per share from the plaintiff, and that only 5*l.* per share had been

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 v.  
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TAYLOR.

The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J.—This was an action upon a policy of insurance dated the 6th of March, 1826, on goods by the ship *Monarch*, at and from Liverpool to any port or place in the River Plate, with liberty, in the event of a blockade, or being ordered off the River Plate, to proceed to any other port, and there wait or discharge. The loss was alleged to have been by capture. The cause was tried before me, and a verdict was found for the plaintiffs, with liberty to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was not a total loss.

It appeared at the trial that the *Monarch* sailed from Liverpool on the voyage insured on the 11th of March, 1826, and was proceeding up the River Plate for Buenos Ayres, when she fell in with a Brazilian frigate below Monte Video, on the other side of the river, was detained and sent into Monte Video, and, after remaining there a short time, was sent from thence for Rio Janeiro for adjudication, with the original master and first and second mates, the steward, a lascar, another of her crew, who was examined as a witness at the trial, a prize-master, and several black and white soldiers and sailors. She sailed in company with several other vessels, but was separated from the convoy. Her own master and crew rose upon the others, overpowered them, bound and sent them all, except two, away in the long boat, and brought the ship and cargo back to Liverpool in September, where the master landed and warehoused the goods, and the plaintiffs had not had possession of them. In the interval between receiving intelligence of the capture and of the rescue, notice of abandonment was given, but not accepted. Notification of the blockade of the ports in the River Plate, belonging to the government of Buenos Ayres, by the Emperor of Brazil, was published in the London Gazette on the 18th of February, 1826. The jury said they were not satisfied

that the master intended to violate the blockade. It was contended on the part of the defendant, both at the trial and on the motion for a nonsuit, that the voyage, being to a blockaded port after notification of the blockade, was illegal in its commencement; and that there was not a total loss of the goods, which were bale goods, they having never been removed out of the ship, but brought back in her to Liverpool. When the motion came to be discussed, it was farther contended on the part of the defendant, that admitting there was no intention to violate the blockade, as found by the jury, the master ought to have waited for an adjudication; that his rescuing the ship was an act contrary to the law of nations, and avoided the policy; or, if not, that his returning to Liverpool, instead of proceeding to some other port, there to wait or discharge, according to the terms of the policy, avoided the policy.

We are of opinion that there is no ground for saying that the voyage as insured was illegal in its commencement. According to the opinion of Lord *Stowell*, in the case of *The Shepherdess* (a), the vessel might have sailed for Buenos Ayres without contravening the law of nations, provided it was part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at Monte Video, or of any of the Brazilian ships met with in the River Plate; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the River Plate, and does not indicate any intention to violate the blockade.

It is not necessary to deliver any opinion upon the effect of the rescue or the return to Liverpool. The cases of *Anderson v. Wallis* (b), and *Holdsworth v. Wise* (c), are authorities to shew that a mere loss of the adventure by retardation of the voyage, without loss of the thing insured, either by its being actually taken from the ship or spoiled,

(a) 5 Rob. Adm. R. 262.

(c) 1 M. &amp; R. 673; 7 B. &amp; C.

(b) 2 M. &amp; S. 240.

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inspector of corn returns of and for the said city and county, as deponent has been informed and verily believes."

*Alderson and Patteson* shewed cause. This rule must be discharged. Assuming for the present that the offices of inspector of corn returns and of alderman are so incompatible, that the acceptance of the former, not being a corporate office, will vacate the latter, it ought at least distinctly to appear that the defendant has been legally appointed to the office of inspector of corn returns. That does not appear upon the affidavit upon which this rule was obtained. The appointment to this office is regulated by the statute 9 Geo. 4, c. 60, s. 20 of which provides, that in every city being a county of itself, the mayor and justices of the peace assembled at the general quarter sessions of such city, or some adjournment thereof, shall have the same powers given by the preceding clause to justices of the peace for counties; one of which is the appointment of inspectors of corn returns. The relator, therefore, ought to have shewn by his affidavit that the defendant was appointed by the mayor and justices of the peace of Norwich assembled at a general or adjourned quarter sessions. It is not sufficient, in any case of this kind, to shew that the defendant has exercised the office, the acceptance of which is urged as the ground for removing him from a corporate office, much less is it sufficient in the present case. In *Rex v. Slythe* (a), where it was held that the affidavit of a relator in a motion for a quo warranto, that he had been informed and believed that the defendant exercised the office which he was charged with usurping, was sufficient, the affidavit applied to the office from which it was sought to remove the defendant; here it applies to the office, the acceptance of which is urged as the ground of removing the defendant from his corporate office: a circumstance which effectually distinguishes that case from the present.

*Scarlett, A. G. and Campbell*, contra. The affidavit is

(a) 9 D. & R. 226; 6 B. & C. 245.

sufficient, being uncontradicted. It states the information and belief of the deponent that the defendant executed the office, which it has for many years been the practice of the Court to admit as sufficient, if uncontradicted. *Rex v. Slythe (a)*.

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Lord TENTERDEN, C. J.—I think this rule ought to be discharged, and that we may discharge it without at all breaking in upon what has been truly stated as the practice of the Court in former cases. The affidavit states the information and belief of the deponent that the defendant has executed the office of inspector of corn returns for the city of Norwich. But his merely executing that office, unless he has been legally appointed to it, will not vacate his office of alderman. Those who seek to remove a man from one office, by shewing that he fills another which is incompatible with that one, must shew clearly that he legally fills the office which is said to be incompatible, and the acceptance of which is supposed to vacate the former. Here the affidavit shews no such thing. It states, indeed, that the defendant had been appointed inspector of corn returns, as the deponent believed, assigning as the ground of his belief that the deponent had seen an entry of such appointment in the books kept by the clerk of the peace, by which it appeared that the appointment was made at a meeting of justices. Now if the affidavit had stated in the most unequivocal terms that the defendant had been appointed at a meeting of justices, that would not have sufficed to shew a legal appointment, because the legislature have thought proper to require that the appointment shall be made by the mayor and justices assembled at quarter sessions. Unless the defendant was appointed by the mayor and justices assembled at quarter sessions, he never filled the office of inspector of corn returns, and, conse-

(a) 9 D. & R. 226; 6 B. & C. 245. And see *Rex v. Harwood*, 2 East, 177, upon the authority of which this point was decided in *Rex v. Slythe*.

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quently, cannot, by reason of his acceptance of that office, have vacated that of alderman. For these reasons it seems to me that this rule must be discharged; but I think it should be without costs.

The other Judges concurred.

Rule discharged, without costs.

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SWEETING v. HALSE.

After a verdict for the defendant and a rule absolute for a new trial, the plaintiff discontinues the action:—The defendant is entitled to the costs of the trial.

IN this case a verdict having been found for the defendant, the plaintiff obtained a rule absolute for a new trial (*a*). He afterwards obtained a rule nisi for liberty to amend his declaration, upon payment of costs, by adding new counts; which rule was, after argument, discharged (*b*). He subsequently obtained a rule to discontinue the action, and upon taxation the master allowed the defendant the costs of the trial. He had now obtained a rule nisi for the master to review his taxation, upon the ground that the rule for the new trial having been silent as to costs, the defendant should not have been allowed the costs of the trial. Against this last rule

*Barstow* now shewed cause. The plaintiff ought not to have taken out the common rule to discontinue; because that can only be taken out, at the latest, before trial, and here a trial has been had. He ought to have made a special application to the Court for leave to discontinue, and the Court could then have laid him under reasonable terms. In that case the plaintiff would, no doubt, have been ordered to pay the costs of the trial; and he cannot be allowed to stand in a better situation now, upon the discussion of this rule, than he would if he had applied to the Court for leave to discontinue. But independently of that point, the master

(*a*) *Ante*, 287.

(*b*) *Ante*, 383.

has done right in allowing the defendant the costs of the trial. No good reason can be adduced why a plaintiff, who seeks to discontinue, should not pay all the costs of a suit which he, by his rule, admits he is unable to maintain. The case of *Gray v. Cox* (a) will be cited on the other side, but there the verdict had been in favour of the plaintiff; and the Court, in holding that the defendant was not entitled, upon a rule for discontinuance, to the costs of the trial, proceeded upon the established principle, that a party cannot be allowed the costs of a trial in which he has been defeated. Here the verdict having been in favour of the defendant, if the cause had gone on to a new trial, and the verdict had been again found for the defendant, he would have been entitled to the costs of both trials, which, for the reasons already given, could not have been the case in *Gray v. Cox*. The case of *Jackson v. Hallum* (b) is, upon this principle, expressly in favour of the present defendant. There the plaintiff obtained a verdict; the Court set aside that verdict, on the ground that the judge had misdirected the jury in point of law; but the defendant, without again going to trial, gave the plaintiff a cognovit; and the Court held that the plaintiff was entitled to the costs of the trial. The Lord Chief Justice there said, "If the plaintiff had obtained a verdict on the second trial, he would only have been entitled to the costs of that trial. Instead, however, of taking the benefit of a second trial, the defendant has acknowledged, by giving a cognovit, that he had no ground of defence to the action, and that the first verdict was right upon the merits. It seems to me, therefore, that in point of justice he ought to pay the costs of the trial; and *Booth v. Atherton* (c) is an authority to shew that such is the rule of law." Here the plaintiff did not chuse to take the benefit of a second trial, and, by abandoning his action, has shewn that the first verdict was right upon the merits.

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(a) 8 D. & R. 220; 5 B. & C. 458.

(c) 6 T. R. 144

(b) 2 B. & A. 317.



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*Chitty*, contra. The case of *Jackson v. Hallam* (a) is not applicable to the present, because there the defendant clearly shewed by his conduct in giving the cognovit, that the plaintiff had a good cause of action on the merits. Here the plaintiff, by discontinuing, has admitted only that he cannot succeed upon the present record; and the opposition that was made (b) to his application for leave to amend, shews that the defendant was conscious that he was liable to an action, and that the verdict which he obtained on the trial was not right upon the merits. If the plaintiff had procured the instrument to be stamped before he went to trial, he would, upon the record as it then stood, have obtained a verdict which could not have been set aside; and it is not denied that the plaintiff, if he commences a fresh action, will be entitled to a verdict on the merits.

Lord TENTERDEN, C. J.—I think this rule ought to be discharged. When a party applies for leave to discontinue his action, the terms upon which he shall be allowed to do so are discretionary with the Court. The new trial in this case was granted in consequence of the objection taken by the plaintiff himself, that an unstamped instrument had improperly been laid before the jury. The plaintiff was entitled to take that objection; but he is not entitled, when taking such an objection, to assume that the merits are with him. He had the opportunity of taking the cause down to a second trial, and he knew that, on the second trial, the unstamped instrument would not be laid before the jury; yet, for some reason or other, he did not chuse to try the cause again. He may bring a fresh action, perhaps successfully; but, with these facts at present before us, I think he ought not to be allowed to discontinue the present action without paying the costs of the trial at which he was unsuccessful. Thus much appears to me upon principle; but I think also that the case which has been cited, of *Jackson v. Hallam*, is expressly an authority in

(a) 2 B. & A. 317.

(b) *Ante*, 383.

point to shew that the plaintiff, by discontinuing the action, has admitted the verdict to be right.

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The other Judges concurred.

Rule discharged.

JONES and others, Assignees of SYKES and BURY, Bankrupts, v. FORT.

IN this case the first count of the declaration charged the defendant with deceitfully obtaining possession of five bills of exchange, under pretence of getting them discounted: there were other counts in trover, alleging a conversion after the bankruptcy. Plea, not guilty; and issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Trinity term, 1828, (a) the case was this:—The action was brought to recover the value of five bills of exchange, which had been delivered by the bankrupts to the defendant, as the plaintiffs alleged, in contemplation of bankruptcy. One of the bills was for 3000*l.*, drawn on *James Hunter & Co.*, due the 23d of July, 1826; one was for 1500*l.*, drawn on *M<sup>r</sup> Lachlan & Co.*, due the 21st of October, 1826; and three were for 500*l.* each, drawn on *Thomas Ferguson*, two due on the 29th of November, and the third on the 5th of November, 1826. The act of bankruptcy was committed on the 28th of November, 1825, and the commission issued on the 30th. The defendant had received the amount of some of the bills as they fell due. On the 23d of October, 1827, after all the bills had become due, the accountant employed by the plaintiffs called upon the defendant and demanded the bills in their names. The defendant referred the accountant to his attorney, but the accountant did not apply to the attorney. Upon this evidence it was contended for the defendant that the action could not be maintained, because

A trader, in contemplation of bankruptcy, delivered bills of exchange to a creditor, who received the money due upon them after the bankruptcy. The assignees brought trover for the bills:—Held, that the receipt of the money by the creditor was not a conversion, and that the plaintiffs could not recover without proving a demand and refusal before the bills became due.

(a) Counsel for the plaintiffs, *Sir J. Scarlett, Platt, and Joshua Evans*; for the defendant, *F. Pollock and Parke*.

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no actual conversion had been proved, nor had the plaintiffs shewn any demand and refusal amounting to evidence of a conversion; that the receipt of the amount of the bills as they fell due was not an actual conversion, but the mere performance of a duty, obligatory upon the holder of a bill, under any circumstances, and for the benefit of all parties; that the demand having been made after the bills became due was insufficient; and that the answer of the defendant, referring to his attorney, did not amount to a refusal. On the other hand it was insisted that the receipt of the amount of the bills as they fell due by the defendant, was in itself an actual conversion, which entirely superseded the necessity of proving a demand and refusal. The Lord Chief Justice was of opinion that the evidence adduced did not shew either an actual conversion or a sufficient demand and refusal; but he proposed to give the defendant leave to move to enter a nonsuit in case the verdict should pass for the plaintiffs. Further evidence was then produced with reference to the first count; and the Lord Chief Justice directed the jury to find a verdict for the plaintiffs, if they were of opinion that the bankrupts had delivered the bills to the defendant in contemplation of bankruptcy, and with the intention of giving him a preference. The jury found for the defendant on the first count, and for the plaintiffs on the counts in trover; and a verdict was entered for the plaintiffs, damages 3500*l.*, the defendant undertaking to deliver up to them such of the bills as remained in his hands unpaid. A rule nisi for entering a nonsuit having been obtained in the ensuing term, upon the ground that there was *no* evidence of a conversion to support the action, and upon the authority of the case of *Nixon v. Jenkins* (a),

(a) 2 H. Bla. 135. There the bankrupt, in contemplation of insolvency, and with a view to defeat his other creditors, sold a large quantity of goods to the defendant, *Jenkins*. Soon after the sale he committed an act of bankruptcy, and his assignees brought trover to

recover the value of the goods; but having failed at the trial to prove a demand and refusal, the Judge was of opinion that they could not recover, there being no evidence of a conversion; but the point was reserved. It was contended that a demand and refusal

*Scarlett, A. G., Platt, and J. Evans*, on a former day in this term shewed cause. In *Nixon v. Jenkins* there was no evidence at all of a conversion; therefore proof of a demand and refusal became absolutely necessary. Here there was evidence of a conversion; for the act of the defendant in receiving the money due upon the bills as they fell due was an actual conversion of the bills themselves; and that act was clearly proved. That being so, it was unnecessary to prove a demand and refusal, because they are only secondary evidence from which a jury may presume an actual conversion. The bills became due, and the money due upon them was received after the act of bankruptcy had been committed; therefore the conversion took place after the act of bankruptcy was committed. Besides, the delivery of the bills by the bankrupts to the defendant, under the circumstances, was void, within the principle laid down in *Rust v. Cooper* (a); and on that ground also proof of a demand and refusal was unnecessary.

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*F. Pollock*, contrà. The plaintiffs have chosen to bring an action of trover, to support which it was necessary for them to prove either an actual conversion by the defendant of the bills themselves, or a demand and refusal, which would have been evidence of a conversion, while the bills remained in his possession. But they have proved neither the one nor the other. The only demand proved was one made after the bills had become due, and the proceeds of

were necessary only in cases where the possession was originally lawful; and that in the case then before the Court there was a wrongful possession, inasmuch as the bankrupt had no right to make a fraudulent sale of his effects for the purpose of defeating his creditors. The Court held, that a demand and refusal were necessary to support the action. When the sale was made, the parties were com-

petent to contract; there was no unlawful taking of the goods, though the transaction was liable to be impeached by the assignees; they might either affirm or disaffirm the contract; and if they thought proper to disaffirm it, they ought to have demanded the goods, a refusal to deliver which would have been evidence of a conversion.

(a) Cowper, 629.

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some of them had been received by the defendant; and the only refusal proved was in fact no refusal at all, for the defendant merely referred the demandant to his attorney. Then did the receipt of the money by the defendant, and the delivery of the bills to the person paying it, amount to an actual conversion of the bills? Clearly not. The original delivery of the bills by the bankrupts to the defendant was lawful; therefore the defendant's possession of them was lawful. It was not certain that the plaintiffs, as assignees, would disaffirm that act of the bankrupts; and until they did so, the defendant, as holder of the bills, not only had a right to obtain and receive payment of them, but was bound to do so as a matter of duty; and in receiving the money and delivering up the bills, he acted, not in the exercise of a right, but in the performance of a duty. The defendant, therefore, was clearly not guilty of a conversion; and the case of *Nixon v. Jenkins (a)* is in point. If the plaintiffs considered that they were entitled, as assignees, to the proceeds of the bills, they should have brought an action of assumpsit for money had and received; at any rate, under such circumstances, an action of trover will not lie.

The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J.—In this case a rule was obtained for entering a nonsuit, on the ground that no actual conversion had been proved, nor any demand and refusal of the bills, before the action was brought, and within such time as was necessary. In fact no demand had been made till after the bills had become payable, and the money due upon some of them had been received by the defendant. It was contended, in support of the action, that the receipt of the money by the defendant, and his delivery of the bills to the parties paying it, amounted to an actual conversion of the bills. But we are of opinion that it did not; because

(a) 2 H. Bla. 135.

the defendant being the holder of the bills, it was his duty to receive the money upon them when due, to whomsoever it might belong; and it would, according to the finding of the jury, have belonged to the plaintiffs as assignees of the bankrupts. But in this form of action they cannot recover without proving either an actual conversion or a demand made within proper time, and a refusal, which are evidence of a conversion. We are of opinion that they have not proved either, and therefore that the rule for entering a nonsuit must be made absolute.

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Rule absolute.

ANN SALMON v. MILLER.

**THIS** was a rule calling upon the plaintiff to shew cause why the defendant should not be discharged out of custody upon filing common bail. The facts that appeared upon the affidavits were these:—The defendant, in January, 1819, had been discharged under the Insolvent Debtors' Act then in operation, 53 Geo. 3, c. 102, commonly called Lord *Redesdale's* Act, as to all the creditors named and specified in his schedule, of whom the plaintiff was one. Her claim was in respect of 2000*l.* Navy 5 per cent. Bank Annuities sold out, and the proceeds lent by her to the defendant several years before. The agreement was, that this stock should be replaced on the 9th of October, 1820, and that a sum equal to the dividends should in the meantime be paid to the plaintiff half-yearly. To secure the performance of that agreement, the defendant executed to the plaintiff a bond and a warrant of attorney. Judgment on the latter was entered up in Michaelmas term, 1818, and the arrears of dividends then due were levied. The action now brought was an action of debt upon the judgment so entered up in 1818; and the defendant had been arrested under the writ in this action.

*B. gave to A. a bond and warrant of attorney to secure the re-investment of stock lent. After judgment entered up B. was discharged under the Insolvent Act, 53 Geo. 3, c. 102, as to his scheduled creditors, of whom A. was one. B. being afterwards arrested in an action on the judgment was discharged out of custody upon filing common bail. Semble, that the debt itself was barred.*

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*Steer* shewed cause. If the defendant had been discharged under the Insolvent Debtors' Act now in force, 7 *Geo. 4*, c. 57, which applies the principle of the modern bankrupt laws to contingent debts and unliquidated demands for which insolvents may be liable, and allows them to ascertain their amount in the same manner, in order that they may insert them in their schedules (*a*), he might have had good grounds for making this application. But the Insolvent Debtors' Act, 53 *Geo. 3*, c. 102, under which the defendant was discharged, contains no such provision, and therefore he cannot have the benefit of it. In January, 1819, when the defendant was discharged under the Insolvent Debtors' Act then in force, 53 *Geo. 3*, c. 102, the sum for which he has been arrested by the plaintiff was not "a debt, damages, or sum of money, contracted, incurred, occasioned, owing, or growing due," within the meaning of s. 29 of that act. The period agreed upon for replacing the stock had not then arrived, and would not arrive until the 9th of October, 1820, and there were no dividends in arrear. If the defendant, after his discharge, had become possessed of property, and that had been taken possession of by his assignees for the benefit of his creditors, the plaintiff would

(*a*) See 7 *Geo. 4*, c. 57, s. 51, which enacts, (reference being had to preceding sections,) "that the discharge of any such prisoner so adjudicated as aforesaid, shall and may extend to any sum of money which shall be payable by way of annuity or otherwise, at any future time, by virtue of any bond, covenant, or other security of any nature whatsoever; and that every person who would be a creditor of such prisoner for such sum of money, if the same were presently due, shall be admissible as a creditor of such prisoner for the value of such sum of money so payable as aforesaid; which value the said

Court shall, upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition: and such creditor shall be entitled in respect of such value to the benefit of all the provisions made for creditors by this act, without prejudice, nevertheless, to the respective securities of such creditor, excepting as respects such prisoner's discharge under this act."

not have been entitled to share in it, because there was no debt owing to her at the period of the defendant's discharge: and if there was no debt owing to her at the period of the defendant's discharge, it follows that such discharge is no release or bar in respect of the debt for which he is now sued. *Davies v. Arnott* (a) applies in principle. There the putative father of an illegitimate child had entered into a bond, with two sureties, with the overseers of a parish, to indemnify them against the expenses of providing for the child; and default having been made by the father, judgment was entered up on the bond, and the sureties were afterwards discharged under the Insolvent Debtors' Act then in force, 1 Geo. 4, c. 119. It was held, that they were still liable to the overseers, in scire facias on the judgment, for expenses incurred by the parish in respect of the child subsequently to their discharge. [*Littledale, J.* That was a very different case from this; the party was not arrested there; the proceeding against him was by scire facias, as perhaps it might properly have been here (b); and the debt arose after the discharge.] It is submitted that the debt here arose after the discharge; *Davies v. Arnott* is cited only as being applicable in principle. And with respect to the date of the debt, it was held in *Lloyd v. Peel* (c) that a plea of discharge under this same Insolvent Debtors' Act, 53 Geo. 3, c. 102, was no bar to an action of trespass for mesne profits, although accruing before the discharge.

*Comyn, contra.* The language of the twenty-ninth section of the statute, 53 Geo. 3, c. 102, is conclusive to shew that the defendant is by his discharge protected from arrest in respect of the debt for which this action is brought. That section enacts, "that no prisoner who shall have obtained his discharge, shall be imprisoned by reason of any judgment, or decree obtained for payment of money, or for any debt, &c., incurred, with respect to which such dis-

(a) 10 B. Moore, 539; 3 Bingham. 154; 1 Mann. & Ryl. M. C. 319.

(b) *Sed vide post*, 553.

(c) 3 B. & A. 407.



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charge shall have been obtained." Now the defendant is sought to be imprisoned by reason of a judgment which had been obtained against him previously to his discharge under the Insolvent Debtors' Act; and that judgment was for the payment of money. The plaintiff, therefore, had no right to arrest the defendant, but should have proceeded by *scire facias*. The judgment was existing at the time when the defendant was discharged. The bond debt merged in the judgment.

LORD TENTERDEN, C. J.—I am of opinion that this rule ought to be made absolute. Judgment had been entered up on the warrant of attorney before the defendant applied for his discharge under the Insolvent Debtors' Act. He had given a bond with a penalty, as a security for his debt, principal and interest, and that penalty had been forfeited at the time when he petitioned for his discharge. If the defendant had become bankrupt, the whole would have been a debt provable under his commission; and his certificate would have been a good discharge; and I see no reason why, by analogy to proceedings under a commission of bankruptcy, it should not be considered as a debt in respect of which he was entitled to be discharged under the Insolvent Debtors' Act. I think, therefore, that the defendant is entitled to be discharged out of custody upon filing common bail. In making this rule absolute, however, we shall not prevent the plaintiff from proceeding with her action, and raising the question, if she shall think fit to do so, upon the record, whether this was a debt in respect of which the defendant was entitled to be discharged under the Insolvent Debtors' Act, 53 *Geo. 3*, c. 102.

LITLEDAL, J. (a)—I am of the same opinion. The judgment having been entered up on the warrant of attorney might have been enforced at the time when the defendant applied for his discharge. The plaintiff should have sued

(a) *Bayley*, J. was absent.

out a scire facias on the judgment, or have taken the defendant in execution (a).

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PARKE, J.—I am also of the same opinion. I think the whole debt was provable against the defendant, and that by analogy to proceedings in a case of bankruptcy, he is released in respect of that debt. The judgment had been entered up at the time when the defendant obtained his discharge. It is quite clear that a bond to replace stock on or before a given day may be proved under a commission of bankrupt, if it be forfeited before the bankruptcy by a breach of any of the conditions. That was decided in the recent case of *Parker v. Ramsbottom* (b).

(a) *Vide post.*

(b) 5 D. & R. 138; 3 B. & C. 257.

In the matter of CASSELL and TRADER.

CERTAIN differences having arisen between *Cassell* and *Trader*, the accounts between the parties were, by indenture bearing date 10th February, 1829, referred to the award, order, arbitrament, final end and determination of *Charles Chapple*, of &c. and *John Eastreuch Adams*, of &c., and such third person, not being now by trade or profession a builder, as they should appoint by indorsement thereon previously to their proceeding in the business of their arbitration, or of any two of them agreeing in manner as is thereafter mentioned. Upon the indenture the following appointment was indorsed:—"In pursuance of the above authority, we, the undersigned, nominate and appoint *William Atkinson*, of &c., the third arbitrator, and declare that the award of either two of us shall be as conclusive as if all concurred. Signed *Charles Chapple*, *John E. Adams*, 12th February, 1829." The indenture, with this indorsement, being made a rule of Court, pursuant to a clause in the indenture to that effect, a rule was obtained by R.

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cannot appoint  
an umpire by  
lot.

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*Bayly* for an attachment for the non-performance by *Trader* of an award made by *Chapple* and *Atkinson*. A cross rule was obtained by *Busby* for setting aside the award, upon the affidavits of *Trader*, one *Davis*, and *J. E. Adams*, stating that after the making of the indenture, *Chapple* and *Adams* met together without the knowledge of *Trader*, and that not being able to agree in the nomination of such third referee, it was agreed between them that *Chapple* should name two persons, and that *Adams* should name two persons also, and that the names of the four persons so by them to be named as aforesaid should be written on four separate pieces or slips of paper, and the said slips of paper put into a hat, to be held by *Chapple*, and that *Adams* should then put his hand into the hat and draw thereout one of the four slips of paper, and that the name of the person appearing upon such slip of paper drawn out should be by them nominated and appointed the third arbitrator or umpire; that in consequence of such agreement, *Adams* named two persons, and *Chapple* named two persons also, whom *Adams* not knowing to be proper persons to be arbitrators did not approve of; that *Chapple* then wrote the names of such four persons as *Adams* supposed, for *Adams* did not see the names so written upon the said slips before the same were put into the hat, upon four separate slips of paper and put them into a hat held by *Chapple*, and that *Adams* then put his hand into the hat so held by *Chapple*, and into which *Chapple* had put the four slips of paper so by him, *Chapple*, written on as aforesaid, and drew, by chance or lot, from out of the said hat one of the said slips of paper with the name *William Atkinson* written thereon, the said *William Atkinson* being one of the two persons named by *Chapple*, and to whom *Adams* had objected as aforesaid; that *William Atkinson* was in consequence thereof nominated and appointed such third arbitrator by *Chapple*; that *Adams* as such arbitrator attended with *Chapple* and *Atkinson* from time to time during the said arbitration, and that *Adams*

refused to concur in the award which *Chapple* and *Atkinson* subsequently made; that until after the award was made, *Trader* was ignorant of the mode in which *Atkinson* had been appointed. The affidavits against the rule stated, that after *Atkinson's* name had been drawn, and before the nomination was indorsed on the indenture, *Adams* sent to request *Atkinson* to accept the office of arbitrator; and that both parties, with their attorneys and witnesses, attended the three arbitrators on the reference.

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*F. Pollock* and *R. Bayly* now shewed cause. If arbitrators draw lots who shall appoint, it is bad (*a*); but if both nominate, and they draw lots whether the nominee of one or of the other be preferred, the appointment is good. *Neale v. Ledger* (*b*). There is no ground for insinuating that *Adams* did not know what names were put in, or that he objected specially to *Atkinson*.

*Godson* in support of the rule. In *Neale v. Ledger* both arbitrators concurred in thinking that the two persons proposed were proper persons to be appointed. Here it does not appear that *Adams* had any knowledge whatever of *Atkinson*. [Lord Tenterden, C. J. I cannot distinguish this case from *Neale v. Ledger*. It is certainly desirable that both should concur. If *Adams* had objected to *Atkinson's* name being put in, the case would have been very different. But not only did he then not object, but even now he does not say that *Atkinson* was not a fit person.]

*Cur. adv. vult.*

LORD TENTERDEN, C. J.—In support of the rule it was sworn, that it was agreed that *Chapple* and *Adams* should each name two persons, and that one of the four names should be drawn by lot. The account given by *Chapple*

(*a*) So held in *Hewitt v. Penny*, (b) 16 East, 51.  
Sayer, 99.

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does not materially differ from this statement. They proceeded accordingly to the usual plan as he calls it. The three arbitrators acted together, but *Adams* did not join in the award. The party himself, *Trader*, did not know in what manner the third arbitrator had been appointed. Two cases were cited in support of the application to set aside the award, *Harris v. Mitchell* (a) and *Wells v. Cooke* (b). In the former case the two arbitrators not agreeing who should be umpire, the one proposing *Chapling*, and the other naming *Ramsay*, they agreed to throw cross and pile who should have the naming of the umpire, or whose man should stand; and the master of the Rolls thought that a sufficient cause to set aside the award. In *Wells v. Cooke* the arbitrators drew lots who should have the nomination of the umpire; and the lot falling on the plaintiff's arbitrator, he nominated a person who had been previously objected to by the defendant's arbitrator. The case of *Neale v. Ledger* (c) was cited in support of the award. In that case, the arbitrators having each proposed a third to the other, and neither of them liking to abandon his own, though not disapproving of the choice of the other, agreed to toss up which of the two proposed should be nominated. Lord *Ellenborough*, in delivering the judgment of the Court, expressed himself to the following effect: "This was not a tossing up between two arbitrators which should nominate a third, in exclusion of the other, which would have been bad according to the cases cited; but after having each of them nominated one, and each of them thinking that the nominee of the other was nearly as proper as his own, agreed to submit their opinion to this mode of selection of one out of the two fit persons. I cannot see any objection to this. The mode of appointing 12 jurors out of all those who are returned as fit to serve is by lot." Upon the authority of this case, which differs but slightly from that now before the Court, I was of opinion that this award might be supported. Some of my learned brothers differed from me. We are all now of opinion that

(a) 2 Vernon, 485.

(b) 2 B. &amp; A. 218.

(c) 16 East, 51.

parties have a right to expect that arbitrators will exercise their judgment in the selection of an umpire. We think it is better not to attempt to draw nice distinctions between this case and any which may have preceded it, but to lay down a general rule that the nomination must be matter of choice, not of chance.

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Rule absolute (a).

(a) And see *Young v. Miller*, 5 D. & R. 263; 3 B. & C. 407.

ROBERT HONE v. GEORGE BESWICK MORGAN, GEORGE  
NEEDLE, and LOYD RICHARD BEALE.

IN Easter term last, *Comyn* obtained a rule calling upon the plaintiff to shew cause why the warrant of attorney, judgment, and writ of testatum fieri facias, in this cause should not be set aside, and why the goods seized and taken in execution by the sheriffs of London should not be restored to the defendant *L. R. Beale* upon the grounds [here four objections to the annuity which this warrant of attorney was given to secure were pointed out]: fifthly, that the grantor having become bankrupt, and a commission having issued against him, the grantee has not proved under the said commission the value of the said annuity as directed by the statute of the sixth year of his present Majesty, cap. 16, s. 55(b). This rule was obtained upon affidavits stating that

Judgment is entered up on a warrant of attorney against grantor of an annuity and his surety before 1 April, 1825, after which day the former becomes bankrupt. By 6 Geo. 4, c. 16, s. 55, no execution can issue against the surety until the value has been ascertained by the commissioners under s. 54.

(b) Which enacts, "That it shall not be lawful for any person entitled to any annuity, granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity and for the payment thereof; and if such surety after such proof pay the amount proved as afore-

said, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity, subsequent to the bankruptcy, shall have become due,) pay the sum so proved as aforesaid, he may be said [sued] for the accruing payments of such annuity, until such annuitant shall have [been] paid or satisfied the amount so proved, with interest thereon at

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in 1823, defendant, *Morgan*, applied to plaintiff for a loan, upon which plaintiff agreed to assign to *Morgan* the leasehold property which would enable *Morgan* to raise the money required, upon condition that *Morgan* would grant an annuity to *Hone*, with *Beale* and *Needle* as sureties; that judgment was entered up on the warrant of attorney in Hilary term, 1825; that a commission of bankrupt issued against *Morgan* 5th June, 1827; that the sheriffs of London levied upon the goods of *Beale* for the sum of 92*l.* 14*s.* for arrears of said annuity by virtue of a fi. fa., returnable on Wednesday next after three weeks of Easter; and that plaintiff had not proved his debt under the commission.

*Bushy* now shewed cause. This case is distinguishable from *Bell v. Bilton*(*a*). That was an action of covenant brought after the passing of the last bankrupt act (*b*) against the surety of the grantor of an annuity, the grantor having become bankrupt. Here judgment was signed before the passing of the act, and, therefore, no *suit* is necessary. [Lord *Tenterden*, C. J. A judgment under a power of attorney is entirely under the control of the Court.] Still there is here no suit. [*Bayley*, J. The suing out of execution is a *suit*.] It has always been considered that the judgment terminates the suit. To make an execution synonymous with suit would have the effect of retarding execution until the party has proved his debt under the commission. [Lord *Tenterden*, C. J. I suppose there is a

the rate of four per cent. per annum, from the time of notice of such proof and of the amount thereof being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satisfied as aforesaid by such surety, and the certificate of the bankrupt shall be a discharge to him from all claims

of such annuitant or of such surety in respect of such annuity, provided that such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission before such surety shall have fully paid or satisfied the amount so proved as aforesaid.

(*a*) 4 Bingh. 615; 1 Moore & Payne, 574.

(*b*) 6 Geo. 4, c. 16.

clause in the warrant of attorney authorising the plaintiff to issue execution without a *scire facias*?] There is. [*Bayley, J.* If this rule be made absolute, the plaintiff may still sue upon his securities, and take the opinion of the Court of error.] If the issuing of execution is to be considered as a *suing* within the 56th section, it must be admitted that the point is not tenable; but even then the judgment and the warrant of attorney cannot be impeached.

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Lord TENTERDEN, C. J.—I think we ought so to consider it. It is only by virtue of the special clause that the plaintiff can take out execution without a *scire facias*. We cannot give effect to the act without considering an execution as equivalent to a suit. The bankrupt would not be discharged if it were open to the plaintiff to take this course. The execution must be set aside, without costs.

#### Rule absolute (a).

(a) "If a man release all *suites*, the execution is gone; for no man can have execution without prayer and *suite*, but the king only; and, therefore, if the king releaseth all *suites*, it is no barre of his execution, because in the king's case the judges ought to award execution *ex officio* without any *suite*; but a release of executions doth

barre the king in that case. And so note a diversity between a release of all actions, and a release of all *suites*." Co. Litt. 291 a.; 3 Tho. Co. Litt. 424. Qu. Whether this distinction is not founded upon an equivocal use of the word "*suit*," as applied to *suing* to the Court and *suing* the parties.

#### STEVENSON v. CREASE.

IN January last, *Thomas Horner* being arrested on a *latitat* returnable on the first return of Hilary term, the defendant and *E. Roche* became his bail to the action. *Horner* signed a *cognovit*, payable by instalments, the last of which became payable before the day on which final judgment could have their knowledge or assent, where no part of the debt and costs is made payable at a time subsequent to the earliest day on which execution might have been obtained.

Bail are not discharged by the levying of part of the debt under a *fi. fa.*; or by a *cognovit* given without



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been obtained, with power to issue execution upon default in payment of the first instalment. Default having been made, judgment was signed on the 27th of February, and on the same day a testatum fieri facias issued, returnable the first return of Easter term, which writ was indorsed to levy 374*l.* The sheriff having returned fieri feci as to part, a ca. sa. issued for 108*l.* 13*s.* residue, on which the sheriff having returned non est inventus, a scire facias issued against the bail and their recognizances. A rule having been obtained by *Archbold* to shew cause why the proceedings in sci. fa. should not be set aside for an irregularity in the service of the summons upon the scire facias, the plaintiff discontinued the proceedings and issued two several bills of Middlesex against the bail. *Archbold* obtained a rule calling upon the plaintiff to shew cause why the proceedings in this cause should not be set aside for irregularity with costs, or why this action and the action of *Stevenson v. Roche* should not be consolidated.

*Talfourd* now shewed cause. Bail are not discharged by a cognovit taken without their knowledge, unless by the terms of the arrangement the payment of the whole or of some part of the debt be deferred beyond the earliest time at which execution could have issued, if the cause had proceeded to trial in its regular course. In *Manning's Exchequer Practice* it is said, "To ground proceedings against bail on their recognizance, the plaintiff must shew his election to seek his remedy against the person of the defendant by issuing a capias ad satisfaciendum, which will be available for this purpose, notwithstanding part of the debt may have been levied under a fieri facias. Per *Gibbs*, C. J. 1816" (*a*). And in the same book (*b*), a case decided in the Exchequer in Michaelmas term, 1807, *Waring v. Jervis* is cited, "in which a ca. sa. issued after a fi. fa., on which part had been levied, but no objection was raised on this ground." This course of proceeding would

(*a*) 1st edition, 472.

(*b*) *Ib.* 475, (*m*).

be clearly good as against the principal; and the bail are benefited by the lessening of their liability to the extent of money levied under the *fi. fa.* It is, therefore, to their advantage that an attempt should be made to obtain satisfaction from the defendant's goods before the bail are resorted to; and it would be injurious to them to hold that a plaintiff cannot try other modes of obtaining payment without discharging the bail. The plaintiff does not oppose that part of the rule which prays that the two actions may be consolidated.

*Archbold*, *contra*. By taking a *cognovit*, the plaintiff deprives the bail of the opportunity of requiring him to prove a cause of action, not only within the declaration but within the affidavit of debt. It is, therefore, immaterial whether further time is given or not (*a*). It is expressly laid down by *Crompton* (*b*), and *Sellon* (*c*), that by issuing a *fieri facias* or an *elegit* (*d*), the plaintiff makes his election to seek his

(*a*) The ground upon which a surety is discharged by the giving of time to the principal debtor is this—that if the obligation of the surety still subsisted, the creditor might, by enforcing the liability against the surety, give to that surety an immediate remedy over against the principal debtor, and the creditor would, in effect, thereby nullify his own contract to postpone the day of payment, or *atteminate* the debt. Where, therefore, the consent to give the further time is not binding, as between the creditor and debtor, for want of consideration or otherwise, or where the time is given with an express reservation of the remedy against the surety, although the surety be ignorant of, or dissent from, such reservation of his liability, the surety is not discharged. In the latter case,

on the one hand, the debtor cannot complain if, by reason of the surety's being called upon before the expiration of the extended term, he himself be compelled to pay within that period, since by assenting to the reservation of the liability of the surety, he must be taken to have consented to accept a conditional extension of the time of payment, or attermination of the debt, subject to a contingency. On the other hand, the surety receives no prejudice; his claims against the debtor, whether for reimbursement or for security, remain entire; and it was no part of his contract with the principal that the latter should enforce his remedies against the debtor within any particular period.

(*b*) 2 *Crompt. Pra.* 71, 3d edit.

(*c*) 2 *Sell. Pra.* 112.

(*d*) An *elegit* seems to stand

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satisfaction out of the defendant's property, and cannot afterwards proceed against the bail. It would be very unreasonable if they could do so; since the issuing of process against the goods is calculated to induce the bail to believe that the plaintiff does not mean to resort to the person of the defendant, and to relax their vigilance.

Lord TENTERDEN, C. J.—We are all of opinion that bail are not discharged by a cognovit taken without their consent or knowledge, unless it give the defendant a longer time of payment than he would have had by defending the action. The other point requires further consideration.

*Cur. adv. vult.*

At a subsequent day in this term,

Lord TENTERDEN, C. J. delivered the judgment of the Court.—It was contended on the part of the defendant, that the plaintiff, by seizing the defendant's property under a fi. fa., had, as against the bail, made his election, and had precluded himself from resorting to the person of the defendant so as to charge the bail. Upon consideration, we are of opinion that the course which has been adopted is regular, not only against the principal (*a*) but also against the bail, who, instead of being prejudiced by the seizure under a fi. fa. will be benefited by the levying of part, in having so much the less to pay.

Rule discharged, with costs.

upon a different ground. Where land of any annual value is taken, the rents and profits must, in process of time, work out the discharge of any debt however large. Vide *Palmer v. Knowllis*, 1 Leon. 176; *Knowles v. Palmer*, Cro. El. 160; *Cooper v. Langworth*, *ibid.*

608, F. Moor, 545; *Foster v. Jackson*, Hob. 57, 58; *Glascock v. Morgan*, 1 Lev. 92; *Lancaster v. Fielder*, 2 Id. Raym. 1451; *Pullen v. Purbeck*, 12 Mod. 356, 7; *Beacon v. Peck*, 1 Stra. 226.

(*a*) *Ante*, 555.

## HALL v. CURZON and LETT.

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**ASSUMPSIT** for work and labour. Plea, non assumpsit; and issue thereon. At the trial before Lord *Tenterden*, C. J. at the sittings at Guildhall, after Easter term, 1828, the following facts appeared. The plaintiff was secretary to a joint stock company, called "The City of London Central Street and Northern Improvement Company." To prove that the defendant *Lett* was a member, one *Harmer* was called, who was shewn, both by his own admission and by other evidence, to be a shareholder and director of the company. The counsel for the defendant *Lett* objected to the admissibility of *Harmer's* evidence, on the ground that by fixing *Lett* as a co-partner, the witness's liability to contribution would be diminished *pro tanto*. The learned judge overruled the objection, giving the defendant leave to move to enter a nonsuit.

In assumpsit by *A.* against *B.* and *C.*, *D.* is a competent witness to prove a joint contract by *B.* *C.* and *D.*, although the liability of *D.* on the contract appear *aliundè*.

*Campbell* now moved accordingly. In *Blackett v. Weir* (a) the joint liability of the witness appeared from his own admission only; a circumstance relied upon in that case, and which clearly distinguishes it from the present. Here, the liability of *Harmer* being shewn *aliundè*, if he proves the joint liability of *Lett* he lessens his own contribution. Suppose an action brought by *A.* against *B.* upon a contract, in which, on the face of it, *C.* alone is the party contracting with *A.*; if *C.* be called as a witness, and proves the joint liability of himself and *B.*, he will have to pay a half instead of the whole to which his signature had made him liable, and for which he would continue liable if the action failed. This case is, therefore, clearly distinguishable from *Blackett v. Weir*. [*Bayley, J.* In *Blackett v. Weir*, the defendant was entitled to contribution at all events.] In that case, *Bayley, J.* says, "In one point of view he had an interest in obtaining a verdict for the defendant, for by

(a) 8 D. & R. 142; 5 B. & C. 385.

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admitting his own liability, he rendered himself liable to a proportion of the costs as well as of the debt, in the event of the plaintiff's obtaining a verdict. The only difficulty that has occurred to me arises from the circumstance of his proving a partnership between himself and the defendant; but his proving that fact in the present action would not be evidence of it in any other. And if the present defendant can hereafter shew that no such partnership in fact existed, he may, probably in a court of law, but certainly in a court of equity, recover from the witness the full amount of his liability in this action." It is questionable whether such an action ever was, or could be, maintained. [*Parke, J.* In *Lockart v. Graham* (a) a co-obligor was allowed to be a witness to prove the execution of the bond against the defendant, another co-obligor.] In that case, it would appear upon the face of the bond that the witness and the defendant were both named as obligors (b). Here the witness is called for the purpose of making out the joint contract.

*Cur. adv. vult.*

Lord TENTERDEN, C. J., now delivered the judgment of the Court.—We have considered the propriety of granting a rule to shew cause why a nonsuit should not be entered, and we are of opinion that the verdict ought not to be disturbed. We think that this case is not distinguishable in principle from the cases of *Lockart v. Graham*, and *Blackett v. Weir* (c). An action of trespass against one of several co-trespassers is barred by a recovery against another co-trespasser (d), yet in practice a co-trespasser not sued is

(a) 1 Str. 35.

(b) Until proof of the execution of the bond, the production of an instrument purporting that certain persons became bound, would not shew a joint, or any, contract.

(c) 8 D. & R. 142; 5 B. & C. 385. *Supra*, 565.

(d) *Brown v. Wootton*, Cro. Jac. 73, S.C. per nomen, *Broome v. Wootton*, Yelverton, 67. In *Drake v. Mitchell*, 3 East, 257, it was said that the case of *Brown v. Wootton* did not prove that judgment only against a co-trespasser could be pleaded in bar, inasmuch as it

frequently called to prove that he, the witness, did the act by the command of the defendant (a).

Rule refused.

appeared there that execution had issued, under which the party had been taken. But the imprisonment of the first sued trespasser under a ca. sa., though satisfaction as against himself, would not carry the case further than the judgment as it respected other parties.

(a) And as the defendant in an

action of tort can have no remedy against a co-tort-feasor for contribution, (*Merryweather v. Nisan*, 8 T. R. 186: but see *Lingard v. Bromley*, 1 V. & B. 147;) the effect of the witness's testimony would be to exempt himself from all liability.

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#### BOTTINGS v. FIRBY and another.

**CASE.** First count, for distraining for more rent than was due; second, for taking an excessive distress; third, for not removing the goods distrained within a reasonable time after the expiration of five days next after distress and notice; fourth, for selling the distress in an unfit and improper manner; with a count in trover. At the trial before Lord Tenterden, C. J., at the Westminster sittings after last term (a), it appeared that this action had been originally commenced in the Palace Court. The defendants not having appeared upon the process issued by that Court, the plaintiff entered an appearance for them according to the statute, signed judgment, and gave notice of executing a writ of inquiry on the 5th of March last, on which day a writ of habeas corpus was sued out by the defendants, who removed the cause into this Court. On the part of the plaintiff it was contended, that the judgment by default was evidence of an admission by the defendants of the cause of action, which, though not conclusive, threw upon them the burden of explaining it. The learned Judge, however, was of opinion, that the judgment by default, under the circumstances, amounted to nothing, and ought to have no weight with the jury. A verdict having been found for the defendants,

Where a defendant suffers judgment by default in an inferior Court, and removes the proceedings into a superior Court, in which he pleads to the issue, the judgment by default is not even *prima facie* evidence of the right of action.

(a) Counsel for the plaintiff, *Erle*; for the defendant, *F. Pollock*.

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*Erle* moved for a new trial, on the ground of misdirection. In the Court below, the judgment obtained by the plaintiff would have bound the defendants conclusively. It is not now meant to be contended that the judgment is conclusive in this Court; but the plaintiff complains that the jury were told that it absolutely came to nothing. Since the trial cases have been looked into; and none has been found to confirm the view taken by the learned Judge. On the other hand, the case of *Aslin v. Parkin* (a) may be considered as an authority for the plaintiff. That was an action for mesne profits, after a judgment by default in ejectment. There it was held, that there was no distinction between a judgment upon a verdict and a judgment by default, and that the tenant was concluded by the judgment by default. [*Bayley, J.* In that case there was a new action. If the judgment below had been conclusive upon the defendants, it would have been a good ground for resisting the removal of the cause into this Court. *Parke, J.* Where a judgment by default is set aside upon terms, you cannot use that judgment for any purpose. Here the habeas corpus sets aside the judgment (b). *Littledale, J.* Upon the cause being removed, the plaintiff could not act upon the judgment by default. The parties stood in the same situation as if the judgment had not been given.] If a conversation had taken place between these two parties, in which the defendants had admitted their liability, it might have been received in evidence, subject to any explanation which the defendants might be able to give.

**LORD TENTERDEN, C. J.**—If any weight had been given by me or by the jury to this judgment, very great injustice might have been done. The defendants do not appear. They do nothing in the Court below. They take out a habeas corpus, but the plaintiff thinks proper to enter an appearance for them.

Rule refused.

(a) 2 Burr. 665; 2 Lord Ken-  
 yon, 376.

(b) Nothing but the plaint is  
 removed by the habeas.

DOE on the demise of THOMAS TAYLOR v. HARRIS and another.

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**EJECTMENT** for messuages and lands at Corsham (a), in the county of Wilts, the possession of which the lessor of the plaintiff sought to recover as the heir at law of *Joseph Taylor*. In 1828 an ejectment had been brought on the demise of the same lessor, to recover other premises devised by *Joseph Taylor*, by the same will and codicil under which the defendants claim. Notice of trial was given for the summer assizes, 1828, and countermanded. A rule for judgment as in case of a nonsuit was discharged, on a peremptory undertaking to try at the spring assizes, at which, upon proof of the will and codicil, the counsel for the plaintiff declined to address the jury, and submitted to be nonsuited. The defendants' costs in that action were taxed at 96*l.*, and had not been paid. Upon an affidavit stating these facts, and the deponent's belief that the present action was brought upon the same title, and solely to question again the validity of the same will and codicil,

Where an heir at law brought an ejectment to recover part of the devised premises, and failed, and afterwards brought a second ejectment against other parties, who held other parts of the devised premises, the Court refused to stay the proceedings in the second action until the costs of the first were paid.

*Coleridge* moved for a rule to shew cause why the proceedings in this action should not be stayed until payment of the costs in the former action. This ejectment is brought upon the same title, by the same claimant, and for the purpose of trying the same question which was raised at the former trial. This case, therefore, falls within the principle of the former decisions (b).

Lord TENTERDEN, C. J.—In this case the defendants

(a) *Ante*, iii. 513.

(b) *Keene d. Angel v. Angel*, 6 T. R. 741; *Doe d. Cotterell v. Roe*, 1 Chitt. Rep. 195. In the former of these cases the lands were different, and a new defendant had been added. And see *Doe d.*

*Chadwick v. Law*, 2 W. Bla. 1158; *Thrustout v. Holdfast*, 6 T. R. 223; *Doe d. Church v. Barclay*, 15 East, 232; *Goodtitle v. Mayo*, 1 Tidd, 9th edit. 99; *Smith d. Jordan v. Roe*, *ib.* 538; *Doe v. Law*, *ib.* 1233; *Fairclaim v. Thrustout*, *ibid.*



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are not the same as in the former ejectment, nor is the action brought in respect of the same subject-matter. We should be going farther than the Court has hitherto gone if we were to interfere in the manner prayed.

Rule refused.

DOE on the demise of JANE HUDSON v. JAMES JAMESON.

A party residing abroad may, upon being admitted to defend an ejectment as landlord, be required to give security for costs.

**EJECTMENT** for lands in the county of Cumberland. In the early part of this term *T. Clarkson* obtained a rule calling upon the defendant to shew cause "why the landlord's rule and the consent rule in this cause should not be discharged, and the defendant's appearance and plea set aside, unless the defendant shall consent to give security for the costs in this cause to the satisfaction of the master," upon an affidavit stating that the defendant then was, and had for several years been resident, with his wife and family, near Greenock, in Scotland.

*Patteson* now shewed cause. This is quite a novel application. There is no case in which the Court has compelled a defendant residing abroad to give security for costs. It is true that this is an action of ejectment, which is said to be the creature of the Court. But the power to defend as landlord is given by statute, and is claimed, not as a matter of favour, but of right.

Lord TENTERDEN, C. J.—This is a very reasonable application.

PARKE, J.—The statute merely says, that it shall and may be lawful for the landlord to defend.

Rule absolute.

## DUNN v. MURRAY.

1829.

**ASSUMPSIT.** The declaration stated, that on the 2d of February, 1827, at &c., in consideration that plaintiff, at request of defendant, would enter into the employ of defendant in the capacity of a reporter of the proceedings of the Court of King's Bench, and also of the proceedings of the House of Commons, and would furnish reports of such proceedings to defendant, his servants or agents, for the purpose of publication in a public newspaper of defendant, for one whole year, to wit, from &c. aforesaid, at and for a certain salary or wages, at the rate of five guineas per week throughout the year, defendant undertook &c. to retain and employ plaintiff in the capacity aforesaid, at and for the salary or wages aforesaid, and continue him in such employ for one whole year, to wit, from &c. aforesaid. And though plaintiff, confiding in the promise &c. of defendant, did afterwards, to wit, on &c. aforesaid, at &c., enter into the employ of defendant in the capacity aforesaid, and on the terms aforesaid, and did furnish reports of such proceedings as aforesaid to defendant, his servants and agents, for the purpose of publication in the said public newspaper of defendant, for a long space of time, to wit, until the 4th of August, 1827, at &c.; and though plaintiff was on &c., at &c., and had always been ready and willing, and then and there offered to continue in the employ of defendant in the capacity aforesaid, and on the terms aforesaid, and to furnish such reports as aforesaid, for the purpose aforesaid, for the remainder of the said year; yet defendant did not nor would continue plaintiff in his employ until the expiration of the said year, but on the contrary thereof then and there refused to suffer plaintiff to continue in defendant's said employ, and discharged plaintiff therefrom, without any reasonable or probable cause whatsoever, and had hence hitherto wholly neglected and refused to retain or continue plaintiff in his employ for the remainder of the said year: By means whereof plaintiff had lost and been

Where all matters in difference in a cause are referred, and the arbitrator awards to the plaintiff a sum in satisfaction of his damages in the cause, the plaintiff cannot afterwards support another action for a demand within the scope of the reference, and which he might have brought before the arbitrator.

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deprived of all the wages, profits and emoluments which he otherwise might and would have derived and acquired from being continued in the employ of defendant as aforesaid, and which defendant had from that time wholly refused to pay or allow to plaintiff, and plaintiff had been, by reason of the premises, wholly unemployed for the remainder of the said year. Counts for wages and salary, for money had and received, and on an account stated. Plea, non assumpsit; and issue thereon.

This case was referred to *B. H. Malkin*, Esq. barrister at law, who, by his award, stated the following facts:—  
 “The said *J. Murray*, one *W. J. Stewart*, and one *W. Mudford*, together with certain other persons, on and before the 2d of February, 1827, were the proprietors of a certain public newspaper, and so continued until and after the 2d of February, 1828, and the said *J. Dunn* was engaged by the said proprietors as a reporter of the proceedings in the Court of King’s Bench, and also of the proceedings in the House of Commons, for the said newspaper, for the space of one year, beginning on the said 2d of February, 1827, at a salary of five guineas a week during the whole of the said year; and the said *J. Dunn* entered upon his duties as such reporter, and continued to perform the same until the 4th of August, 1827, when he was discharged from the said employment by the said proprietors, without any just cause for his said discharge; and the said *J. Dunn* after that time continued ready and willing, and tendered and offered to perform the duties of his said employment; and the said *J. Dunn*, in Michaelmas term, 1827, filed his bill in a certain action of assumpsit against the said *W. J. Stewart*, *J. Murray*, and *W. Mudford*; which said bill contained, among other counts, a count for the wages or salary of the said *J. Dunn*, for his services by him before then done and performed as a reporter of law proceedings in the Court of King’s Bench, and of debates and other proceedings in the House of Commons, and for preparing reports of such law proceedings, debates, and

other proceedings, for the said *W. J. Stewart, J. Murray, and W. Mudford*, their servants and agents, for the purpose of publication in a certain public newspaper of them the said *W. J. Stewart, J. Murray, and W. Mudford*; and also a count for work and labour, care and diligence, before that time done, performed, and bestowed by the said *J. Dunn* for the said *W. J. Stewart, J. Murray, and W. Mudford*, at their instance and request, and for divers materials and necessary things before that time found and provided by the said *J. Dunn* for the said *W. J. Stewart, J. Murray, and W. Mudford*, at their like instance and request, and used and applied in and about the said work and labour; and also a special count, similar to the first count in the declaration in this cause. The plaintiff laid his damages at 800*l.*, and the defendants pleaded the general issue only. On the 9th of July, 1828, all matters in difference in the said cause between the plaintiff and the said *W. J. Stewart, J. Murray, and W. Mudford*, were referred, by order of *Nisi Prius*, to the arbitrament of *T. N. Talfourd, Esq.* barrister at law, and it was ordered that the costs of the said suit should abide the event of the award, and that the costs of the reference should be in the discretion of the arbitrator. That order was, on Thursday next after the Morrow of All Souls, in the year 1828, made a rule of this Court. Mr. *Talfourd*, on the 16th of September, 1828, made his award concerning the matters so referred to him, and thereby awarded that the plaintiff in the said suit had good cause of action in the said suit against the defendants in the same, to the amount of 63*l.*, which he was entitled to recover as and for his damages in the said suit; and he also awarded and adjudged, that the defendants in that suit should pay to the plaintiff in the same the said sum of 63*l.* in satisfaction of his damages sustained in the said cause, and that the cause should be prosecuted no further; and that the defendants in that cause should pay their own costs of the reference and of that award, and should also pay the plaintiff his costs in that cause, and of the said reference


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and award, the same being taxed by the proper officer of the Court. The said *W. J. Stewart, J. Murray, and W. Mudford*, the defendants in the said cause, on the 19th of November, 1828, paid to the plaintiff in the same cause the damages and costs as by the said award was directed. The said dismissal of the plaintiff from the service of the said proprietors was proved in evidence before Mr. *Talfourd* upon the said reference; but no claim was made before him for any compensation in damages for such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th of October, 1827, being the day on which the said writ in the said action was served, except so far as the counts in the declaration above set forth, and the evidence of the said employment and dismissal, might amount to such a claim; and Mr. *Talfourd*, in assessing the said damages, made no allowance for any such compensation in damages aforesaid, but assessed the same as the amount of wages or salary accruing up to the said 27th of October, and on no other account whatsoever." It was further found by Mr. *Malkin*, that the declaration in the present action was filed after the payment of the said damages and costs in the former action, that is to say, on the 18th of November, 1828; and that the plaintiff had no cause of action in this cause against the said defendants in the same, except upon account of his said dismissal by the said proprietors, and of their failure to employ him as aforesaid until the end of the said year. And upon these facts, so found by him for the opinion of the Court as aforesaid, he awarded and adjudged that the plaintiff had good cause of action in this cause against the said *J. Murray*, unless the Court should be of opinion that the said proceedings in the said cause, wherein the said *J. Dunn* was plaintiff, and the said *W. J. Stewart, J. Murray, and W. Mudford*, were defendants, and the said reference and award so made in the same as aforesaid, and the said payment of the said damages and costs so awarded in the same, were a bar to the recovery of the said *J. Dunn* in this

action. And if the Court should be of opinion that the said proceedings, reference, award, and payment were no bar to the recovery of the plaintiff in this action, then he awarded that a verdict should be entered for the plaintiff in the same for 52*l.* 10*s.* damages, and 40*s.* costs; and if the Court should be of opinion that the said proceedings, reference, award, and payment were a bar to the recovery of the plaintiff in this action, then he awarded that a verdict should be entered for the said *J. Murray* in the same. A rule nisi having been obtained for entering a verdict for the plaintiff for 52*l.* 10*s.* damages, and 40*s.* costs, pursuant to the award,

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*F. Pollock* and *R. V. Richards*, on a former day in this term, showed cause. The claim set up in the present action was a matter of difference in the former action, and was within the scope of that reference. The plaintiff having under the former award recovered upon a count adapted to let in the whole amount of his present claim, is concluded, and cannot be allowed to recover in a fresh action arising out of the same subject-matter. There are two authorities expressly in point. In *Smith v. Johnson* (a) disputes existing between the master and owner of a ship, touching the ship's accounts on a certain voyage, they referred all actions and causes of action to arbitrators, who awarded a balance to be paid by the owner to the master. It was held, upon a rule for an attachment for non-payment of the sum awarded, that it was not competent for the owner to claim a deduction of a certain sum, the price and proceeds of certain goods shipped on their joint account, the whole of which had been paid by the owner in the first instance, on the ground that such particular adventure formed no part of the disputes between them, and had not been submitted to, nor taken into consideration by the arbitrators; because it was within the scope of the reference, the object of which was to make a final settlement be-

(a) 15 East, 213.

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tween the parties, and it was the owner's own fault if he kept back that item of the account. So, in *Williams v. Lord Bagot (a)*, where the plaintiff sued his steward in an inferior Court for 4000*l.*, which was a less sum than he knew to be due to him upon a final investigation of the defendant's accounts; and, upon judgment by default, verified for 3400*l.*, it was held, upon a plea of judgment recovered, in answer to a second action in this Court for the balance due, that the plaintiff was concluded by the action brought in the inferior Court. So here it must be taken that the first award was made with reference to all the matters in difference then referred. *Hambleton v. Veere (b)*, which may perhaps be cited on the other side, is a very different case. There, the action was in tort; the respective rights of the master and apprentice had never been extinguished; and the master, after recovering damages, was still entitled to the service of the apprentice. Here, the contract was dissolved, and the defendant could not afterwards have called upon the plaintiff to resume the performance of his duties for the remainder of the year.

*Campbell and Tomlinson*, contra. The case of *Lord Bagot v. Williams (a)* has no application to the present. There, the defendant pleaded a judgment recovered in respect of the same cause of action, upon which issue was joined, and found against the plaintiff; here, the general issue only was pleaded. In this case, therefore, there is nothing to shew that the plaintiff could recover in the second action damages for the same cause of action for which he might have recovered in the first action. The question now is, whether the plaintiff has, in fact, received compensation to the full extent of his claim; and if it appear that he has not, he is clearly entitled to recover in the present action. The award upon the reference of the former action, not being pleaded, is no estoppel; *Vooght v.*

(a) 5 D. & R. 87; 3 B. & C. 235.

(b) 2 Saund. 169.

*Winch* (a), where it was decided, that a verdict obtained by the defendant in a former action, and which, if pleaded in bar, would be an estoppel, when given in evidence under the general issue, is not conclusive against the plaintiff, but only evidence to go to the jury (b). Now here there is no ground for presuming that the arbitrator, upon the first reference, took the special count at all into his consideration; it may not have been proved to his satisfaction: and he expressly states in his award that no claim was made upon it. There is little doubt, indeed, that the arbitrator, in fact, proceeded only upon the general indebitatus count, under which the amount of wages or salary due for the by-gone time was recoverable, the plaintiff having offered to continue his services to the end of the year; *Gundell v. Pontigny* (c), *Eardley v. Price* (d). But under that count no more than the amount of salary due for by-gone services could be recovered; the former recovery, therefore, is no bar to the present action. The first reference was not of all matters in dispute between the parties, but only of all matters in dispute in that cause; and an award does not in every case operate as a bar to any future proceedings between the parties; for it has been decided, that although all matters in difference be referred, yet it is competent to a party to shew that a particular difference did not exist at the time of the reference, or was not brought under the notice of the arbitrator; and in respect of such difference the party may sue. *Caldwell on Arbitration* (e), *Ravee v. Farmer* (f), *Golightly v. Jellicoe* (g).

The Court took time to consider of their judgment; which was now delivered by

LORD TENTERDEN, C. J.—This was a case stated for the opinion of the Court by a gentleman at the bar, to whom

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| (a) 2 B. & A. 662.   | (d) 2 New Rep. 333. |
| (b) As to the conclusiveness of a colonial judgment, see <i>ante</i> , ii. 581, (a). | (e) 132, 201.       |
| (c) 4 Campb. 375.  | (f) 4 T. R. 146.    |
|  | (g) 4 T. R. 147, n. |



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the cause had been referred. The action was for wages claimed by the plaintiff upon a contract for his services for a year, commencing on the 2d of February, 1827. It is found that he was discharged on the 4th of August, 1827, without any just cause, and that he afterwards brought an action against the present defendant and certain other persons, joint parties to the contract, declaring generally for wages, and specially for damages on account of being discharged from the service. All matters in difference in that cause were referred; and the arbitrator in the present case has found that the dismissal of the plaintiff from the service was proved in the former case, but that no claim was then made for any compensation in damages for such dismissal, except or beyond a claim for the amount of wages or salary accruing up to the 27th of October, 1827, being the day on which the writ in that action was served, except so far as the counts in the declaration, and the evidence of the employment and dismissal, may amount to such claim. Now it is certain that the present claim *might* have been brought before the arbitrator upon that occasion; and in the case of *Smith v. Johnson* (a), Lord *Ellenborough* lays it down, that where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So here, the present claim was within the scope of the former reference, for it arose out of the dismissal; it was the duty of the plaintiff to bring it before the arbitrator, if he meant to insist on it as a matter in difference; and not having done so, he cannot now make it the subject-matter of a fresh action. The rule for entering a verdict for the plaintiff must therefore be discharged.

Rule discharged.

(a) 15 East, 213.



## LEIGH v. HIND.

1829.

**DECLARATION** in debt, stating, that by indenture of assignment of 17th of December, 1827, defendant, for the consideration of 2550*l.* paid to him by plaintiff, assigned &c. to plaintiff an indenture of lease in the indenture of assignment mentioned, and also a messuage, &c., being a public house called the Black Lion, in Bishopsgate Street, to hold for the residue of a term of 21 years; that defendant, by this indenture, covenanted with plaintiff, that in case he, defendant, should at any time thereafter, during the continuance of the term by the lease granted, (provided plaintiff should then occupy the premises thereby assigned, and be carrying on the business of a victualler therein,) keep any licensed victualling house, or use, or exercise, or be in any manner concerned, directly or indirectly, in the business of a victualler, *within the distance of half a mile from the premises thereby assigned*, then he, defendant, his executors &c., should, within 14 days after demand made, repay to plaintiff, his executors &c., 1000*l.*, parcel of the said 2550*l.*; that plaintiff, by virtue of the assignment, entered upon the premises, and became possessed thereof for the term assigned, and performed the covenants contained in the lease; but that defendant kept a victualling house, and exercised, and was concerned in, the business of a victualler, *within the distance of half a mile from the premises assigned*; and that plaintiff thereupon demanded of defendant to repay him 1000*l.*, which defendant refused to do. Plea, that defendant did not keep a licensed victualling house *within the distance of half a mile from the premises assigned*. Issue thereon. At the trial before Lord *Tenterden*, C. J., at the London adjourned sittings after Hilary term, 1829, a verdict was found for the plaintiff for 1000*l.*, subject to the award of a gentleman at the bar, who was to ascertain the distance between the Black Lion, in Bishopsgate Street, and the Southwark Bridge Tavern, in Queen Street, the latter being a licensed victualling house kept by the defendant; and

In a covenant not to keep a public house within half a mile of a particular spot, the distance must be estimated by the nearest mode of access at the time of the covenant, per Lord *Tenterden*, C. J., and *Littledale*, J.; or as the crow flies, per *Parke*, J.

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who was to state upon the face of his award the different admeasurements taken under his direction, and the mode of taking them. The arbitrator stated in his award, that he had caused three different admeasurements to be taken; one pursuing the course of a person going out of the door-way of the Black Lion, and continuing for the most part along the foot pavement, but occasionally deviating therefrom into the carriage-way, and entering the door-way of the Southwark Bridge Tavern; another being the course of a person going out of the door-way of the Black Lion, at right angles to the same, to a spot in the carriage-way distant two feet and nine inches from the curb-stone, and proceeding along the carriage-way, in the nearest direction a carriage could take, to a spot also distant two feet nine inches from the curb-stone, opposite to one of the door-posts of the Southwark Bridge Tavern, and passing from such last-mentioned spot to the curb-stone, and thence to the door-way of the said tavern, by walking across the foot pavement, in a direction slightly inclining to the left hand; and a third measured from the centre of the door-way of the Black Lion to the centre of the door-way of the Southwark Bridge Tavern, along the foot pavement and crossings for foot passengers. The arbitrator then adjudged the distance between the Black Lion and the Southwark Bridge Tavern to be, according to the admeasurement first mentioned, 2627 feet and one inch; and according to the admeasurement secondly mentioned, to be 2638 feet; and according to the admeasurement lastly mentioned, to be 2695 feet; and he determined the Southwark Bridge Tavern to be within half a mile from the Black Lion, and the distance, by the nearest mode of access, between the two, to be less than half a mile. The arbitrator then awarded, that the verdict found for the plaintiff should stand. A rule nisi for setting aside the award having been obtained,

*Gurney and Patteson* now shewed cause. The defendant covenanted that he would not keep a public house within

the distance of half a mile from the Black Lion. The award finds that the public house kept by the defendant is within that distance from the Black Lion; finding in terms, therefore, that the defendant has committed a breach of his covenant. If the defendant intended the distance to be calculated by any other than the shortest mode of passage, he should have provided for that in his covenant. The arbitrator, construing the words of the covenant as they ought to be construed, according to their plain and ordinary import, has found that the distance, by the shortest mode of passage between the two houses, is less than half a mile, and therefore that the defendant has broken the covenant. That finding is right, and this rule must be discharged.

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*Scarlett, A. G., and Chitty, contra.* The covenant should be construed according to the intent of the parties, to be collected from the whole of the instrument. That intent clearly was to prevent the defendant from interfering with the customers who frequented the house assigned by him to the plaintiff. The distance, therefore, should be calculated, not by the nearest line, or, in common parlance, as the crow flies (*a*), but by that line which persons in general frequenting such houses would take in going from one to the other. Suppose the case of a walled town, one house within and the other without the wall, exactly opposite. As the crow flies, the distance would be only a few feet, but by the actual course a passenger would be obliged to take, it might be half a mile, or more. The usual mode of access is that which the parties to this covenant contemplated; and persons frequenting a public house would use the foot pavement only, and not the carriage-way. It was held in *Woods v. Dennett* (*b*), that in the construction of an engagement not to open a shop within a mile of a certain spot, the shortest way of access *by the footpath* should be

(*a*) The award seems to assume that the parties had not meant to contract with reference to a mathematical right line, the termination

of which there would be no practicable mode of ascertaining.

(*b*) 2 Stark. N.P.C. 89.

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taken. [Lord *Tenterden*, C. J. In this case a person could not by possibility go from one house to the other entirely by the footpath; he must necessarily cross the carriage-way occasionally.] Still the distance should be taken by the shortest way of access along the footpath, where there is a footpath, and by the usual crossings for passengers, where it is necessary to cross the carriage-way. That was the third mode of admeasurement taken in this case, and by that mode the distance exceeds half a mile. Covenants of this nature, being in restraint of trade, are not to be favoured: *Cruttwell v. Lye* (a), *Bozon v. Farlow* (b).

LORD TENTERDEN, C. J.—The arbitrator, after describing in his award the three different admeasurements which he had caused to be taken, and stating the number of feet by each way, has awarded that the Southwark Bridge Tavern is within half a mile of the Black Lion, and that the distance, by the nearest mode of access between the two, is less than half a mile. Now unless the nearest mode of access be taken, it is difficult to say what other mode should be taken. If we depart from it a little in this case, we may be called upon to depart from it still more in another; and the consequence will be, that there will be no certain rule applicable to the subject. I think the distance must be measured by the nearest mode of access, and that this must be taken to have been the intention of the parties. On this short ground I am of opinion that the award is right.


LITTLEDALE, J. (c)—I take the proper principle of admeasurement in cases of this sort to be, to measure by the nearest mode of access, according to the existing state of the streets. If the distance between the two houses in this case had been originally more than half a mile, according to that principle, and a new street had been afterwards opened which rendered the distance between them, accord-

(a) 17 Ves. 335.

(c) *Bayley*, J., was absent

(b) 1 Meriv. 459.

ing to that principle, less than half a mile, and the defendant had continued to occupy the Southwark Bridge Tavern, under these circumstances, I think he would have been guilty of a breach of his covenant.

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PARKE, J.—It seems to me that the right mode of measuring the distance, in a case of this kind, is to take a straight line from house to house, in common parlance, to take the distance as the crow flies. Here the defendant covenanted not to keep a public house within half a mile of that of the plaintiff. The plain and ordinary meaning of those words is, the actual distance; and I think we ought so to construe them, unless we find something in the context shewing that they were intended to be used in a different sense. Now there is nothing in the context which shews any such intention. It is clear that neither of these parties contemplated that the customers of the one public house should go from that to the other. I am therefore of opinion that the distance between them should have been calculated without any reference to different modes of communication. It was probably deemed unnecessary, in the case of *Woods v. Dennett* (a), to contend for this mode of admeasurement on the part of the plaintiff, because it was conceived that there was a good cause of action, even adopting a different mode of admeasurement. But, at any rate, that particular point was not pressed upon Lord *Ellenborough's* notice; therefore his ruling in that case cannot be considered as an authority against the construction which I am now suggesting, and which appears to me to be the right one. But even if I am wrong in considering this the proper mode of construing the agreement, I still think the rule to be clear, that the proper line would be the shortest which a person would be likely to take, who intended to make the best of his way from the one house to the other: that is, using the foot pavement where there was one, and where it was most convenient to use it, and the

(a) 2 Stark. N. P. C. 89.

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carriage-way either where there was no foot pavement, or it would be most convenient to deviate from it. Here the arbitrator has awarded, that, according to that mode of taking the distance, the house kept by the defendant is within the distance of half a mile from the house assigned by him to the plaintiff. In any view of the case, therefore, I am clearly of opinion that the award is right, and that the rule for setting it aside ought to be discharged.

Rule discharged.

PHILLIPS, Assignee, &c. v. DANCE.

Where a special jury cause is not tried because neither party prays a tales, the defendant cannot have judgment as in case of a nonsuit, or try the cause by proviso.

THIS was a special jury cause, and the plaintiff had carried the record down for trial; but a full special jury not appearing, neither party prayed a tales, and the cause was not tried. The plaintiff never took any further proceedings. The defendant obtained a rule nisi for judgment as in case of a nonsuit, which was discharged upon production of an affidavit disclosing the facts above stated. The defendant then took out a side bar rule for trial by proviso; and the plaintiff obtained a rule nisi for setting aside that rule.

*Chitty* shewed cause. No reason can be suggested why the defendant should not be allowed to try by proviso. He cannot obtain judgment as in case of a nonsuit, and he has no other remedy. The action ought not to be permitted to hang over his head *ad infinitum*, which will be the case if this rule be made absolute. If the plaintiff do not chuse to carry down the record again, at least he should permit the defendant to do so.

*Barstow*, contra. The reason why the defendant cannot be allowed to try by proviso is, that he has already had one opportunity of trying the cause, which he lost by refusing to pray a tales. A defendant has no right to call upon a plaintiff to give him more than one opportunity of trying

the cause. The defendant must always be prepared; the plaintiff may try when he pleases, subject always to the being forced on by certain rules to give the defendant one opportunity to try. The rule for a trial by proviso assumes that the plaintiff has been guilty of default, and that the defendant has never had an opportunity to try, for it runs in these words: "Let there be a record of *Nisi Prius* by proviso, if the plaintiff shall have made default." Here, the plaintiff has made no default; for he carried the record down for trial once, and gave the defendant the opportunity of trying the cause if he would. *Jenkins v. Purcell* (a) seems in point. There, while the jury were being sworn, the defendant's counsel called for the record, and finding a mistake in it, said they would make no defence. The plaintiff's counsel upon this, in order to avoid a nonsuit and to save the costs, refused to pray a tales; and though twelve had been sworn, yet, there having been no actual prayer of a tales, the cause was suffered to remain for want of jurors. That case occurred two years before the passing of the statute, 14 Geo. 2, c. 17, which gives the defendant no advantage in this respect; it merely provides, that where the plaintiff has made default, the Court may give the like judgment for the defendant as in case of a nonsuit.

PER CURIAM.—Where neither party prays a tales, it cannot be said that the plaintiff has made default; and in such a case the defendant is not entitled to try the cause by proviso.

Rule absolute.

(a) 2 Stra. 707.

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SURTEES and another, Assignees, &c. v. ELLISON.  
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Neither a trading which ceased, nor an act of bankruptcy committed, before 6 Geo. 4, c. 16, will support a commission issued since Sept. 1, 1825.

THE first of the above cases was assumpsit for money had and received by the late sheriff of the county of Durham, to the use of the plaintiffs, as assignees, after the bankruptcy. Plea, non assumpsit; with notice to dispute the trading and the act of bankruptcy. At the trial before Lord Tenterden, C.J., at the sittings at Guildhall after Trinity term, 1828, the following facts appeared:—The bankrupt ceased to be a trader in 1823, being then indebted to the petitioning creditor in 100*l*. An act of bankruptcy was committed in 1827, after which the sheriff seized and sold under a fi. fa. It was contended, that the trading, being prior to the passing of 6 Geo. 4, c. 16, would not support the commission. A verdict was taken for the plaintiff, with leave to move to enter a nonsuit. A rule nisi having been obtained,


*Scarlett, A. G., Alderson, and C. Cresswell*, now shewed cause. Provided the bankrupt were a trader at the time the petitioning creditor's debt accrued, it is immaterial whether he carry on trade at the period of the act of bankruptcy. *Bamford ex parte (a)*. It is sufficient if the plaintiff make out an act of bankruptcy after the present statute came into operation. It is not necessary that the trading should be after the act. [Lord Tenterden, C.J. The language of the statute is, "that if any *such* trader depart this realm, &c."] In an anonymous case in *Ventris (b)*, it is said, "if a tradesman contracts debts and gives over trading, he may afterwards be a bankrupt in respect of the debts contracted before; and so it was said to be ruled in *Sir Job Harrey's* case." A party does not cease to trade until all the debts contracted in trade are paid off. *Bamford ex parte* can be supported only on that principle. A man cannot get rid


(a) 15 Vesey, 449.

(b) 1 Ventr. 5.

of his liability to be made a bankrupt merely by ceasing to contract new debts in the same capacity. After the passing of the statute, the bankrupt remained in the same state as before. It was not intended to exempt a trader from the liability to be called upon for payment in the manner in which he was liable to be called upon before. In *Maggs v. Hunt* (a), the act of bankruptcy was before the statute. Now the act of bankruptcy had not any continuance, whereas trading is a continuing act. [Bayley, J. I do not think that *Bamford ex parte* shews that the bankrupt must be considered as still a trader seeking his living, &c., but merely that discontinuing trade did not deprive the creditor of his remedy of obtaining payment through a commission of bankrupt. Parke, J. The Chancellor does not say that it is to be considered as a continuing trading by reason of his not paying his creditors. Lord Tenterden, C. J. There is a slight difference in the wording of the statutes. In the present act the words are, "who now uses, or who hereafter shall use."] There was a constructive trading after the act as much as before. None of the statutes contain any express provision relating to time past. The words "using trade" must be construed to mean "using trade at the time of the act of bankruptcy," which shews that the decision in *Bamford ex parte* must have proceeded on the ground that the trading was continued until the debts were paid. In *Meggot v. Mills* (b), Lord Chief Justice Holt says, "though a man quit his trade, yet he may be a bankrupt for the debts that he owed before; and though a man who has become creditor to him after the quitting of his trade cannot sue out a commission of bankrupt, this new creditor shall be admitted to have a share of the bankrupt's estate." [Bayley, J. And yet, according to the argument now used, the bankrupt was a trader when the second debt was contracted.] He continued a trader *quoad* the prior creditor. In *Lee v. Lopez* (c), it was held that a commission of bankrupt was not an execution within 8 Anne, c. 14.

(a) 4 Bingh. 212. (b) 1 Ld. Raym. 286. (c) 15 East, 230.

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*Brougham and Chitty*, *contra*, were stopped by the Court, who now ordered the second case (*Hewson v. Heard*) to be called on. In that case the act of bankruptcy, the suffering of the trader's goods to be taken in execution, had been committed before the passing of the act. At the trial before Lord *Tenterden*, C.J., his lordship was of opinion that the case was not within the act, 6 *Geo.* 4, c. 16.

*Chitty* now shewed cause against a rule for entering a nonsuit. The 136th section must be construed as repealing 5 *Geo.* 4, c. 98, only from the time when the new act came into operation. It is nonsense as it stands. [Lord *Tenterden*, C.J. That construction is contrary to *Maggs v. Hunt*.]

LORD TENTERDEN, C.J.—When an act of parliament is repealed, it is the same thing as if it had never existed, except with reference to such parts as are saved by the repealing statute. We are not at liberty to break in upon this rule, by indulging any views of our own, and we cannot find any intention manifested. We must look at this act as if it had been the first legislative provision on the subject of bankruptcy, and it is impossible to see a sufficient trading and act of bankruptcy in *Surtees v. Ellison*. Upon the same principle, that no good act of bankruptcy is shewn in *Hewson v. Heard*, we must say that the rule must be made absolute. It is very unfortunate that an act of so much importance should have been framed with so little care. It is commonly said that a will is to receive a favourable construction, on the ground that the testator is presumed to be *inops consilii*. Of the legislature it may be said, that it is *multas inter opes, inops*.

BAYLEY, J.—The former acts became silent in September, 1825. The 6 *Geo.* 4, c. 16, began to speak on the 1st of September, except that, by the 136th section, the repeal of 5 *Geo.* 4, c. 98, and the regulations in 6 *Geo.* 4, c. 16, as


to certificates of conformity, were to take effect from the passing of the latter statute. There must be a trading and an act of bankruptcy after the 1st of September, 1825. It has been urged, that in *Bamford ex parte*, and *Meggot v. Mills*, the trading was construed to be carried on, as respects the creditors, until the debts were discharged. The fair meaning of those decisions is, that the party remained liable to a commission of bankrupt, although he ceased to continue a trader. In *Meggot v. Mills* it is assumed that the bankrupt quitted trade before the act of bankruptcy was committed. I do not think that this shews that the trade continued for any purpose. Here, the party had ceased to have any thing to do with trade when the present bankrupt act passed.

LITLEDALE, J.—I am entirely of the same opinion. In the cases cited, the same bankrupt law continued, and the only question was, in what manner that law should be administered.

PARKE, J.—I am of the same opinion. The only question is, whether this case comes within two sections of the present bankrupt act, the second and the third. It is contended that it does, because the trading continued. It was not so laid down in the cases which have been referred to to establish this position. They only shew that the trading and the act of bankruptcy need not be contemporaneous.

In *Hewson v. Heard*, the act of bankruptcy being before the late act, it is clear that the commission cannot be supported.

Rule absolute in each case.

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CARR, Gent. one, &amp;c. v. STEPHENS, Gent. one, &amp;c.

*C.* having received rents for the separate use of *B.*, the wife of *A.* accepts, without her privity, a bill drawn by *D.*, a creditor of *A.*, payable to *D.* or order. Before the bill becomes due, *A.* and *B.* require the rents to be paid to themselves. *C.* refuses to pay his acceptance without an indemnity from *D.* against the claims of *A.* and *B.* The indemnity is given, but *C.* pays the rents to *A.* and *B.* As *D.* would be liable to refund upon his indemnity, he cannot sue *C.* on his acceptance.

**ASSUMPSIT**, by the drawer of a bill of exchange, payable to the plaintiff, or *his order*, against the acceptor, with the money counts. Plea, non assumpsit; under which 40*l.* 6*s.* 8*d.* was paid into Court. At the trial before Lord *Tenterden*, C. J., at the sittings at Guildhall after Trinity term last, the following facts appeared:—Mrs. *Hodder*, the wife of Captain *Hodder*, was the equitable devisee of a real estate, of which the defendant had been appointed receiver under an order which directed the money to be paid to Mrs. *Hodder*. The plaintiff, however, afterwards obtained an order, directing the payment to be made to Captain and Mrs. *Hodder*. Upon passing the defendant's accounts in 1826, the sum of 300*l.* was found to be in his hands. At this time the plaintiff, who was the attorney for Captain and Mrs. *Hodder*, had a claim against the former for 149*l.* 4*s.* 4*d.* for money lent; and he had a claim of 40*l.* 6*s.* 8*d.* against the defendant, for business done for him as receiver. The acceptance in question was given by the direction of Captain *Hodder*, but without any authority from Mrs. *Hodder*, for the purpose of covering these two sums; and Captain *Hodder's* receipt for the 149*l.* 4*s.* 4*d.* was then shewn to the defendant. Before the acceptance fell due Captain and Mrs. *Hodder* demanded from the defendant the whole 300*l.*, which sum was paid to them by the defendant before the commencement of the present action. When the bill became due, the defendant refused to pay the amount, unless the plaintiff would indemnify him against the claims of Captain and Mrs. *Hodder*. The following letter was accordingly written by the plaintiff to the defendant:

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Sir,—In consequence of your having accepted and given me your bill for 189*l.* 11*s.*, which includes 149*l.* 4*s.* 4*d.* due to Captain *Hodder*, I do hereby engage to indemnify and keep you harmless against the payment of that sum (say 149*l.* 4*s.* 4*d.*, due by Captain *Hodder*), to me. And I also

further engage to indemnify and keep you harmless against the payment of any other sum or sums of money that you may make to me on Captain *Hodder's* account. You will oblige me much by making up the account of the Gillingham rents due to Captain *Hodder*, as I shall be glad to have the amount."

The defendant, however, afterwards refused to pay the bill; and brought into Court, upon the money counts, the 40*l.* 6*s.* 8*d.* due from himself, independently of the bill. The defendant contended, that as Mrs. *Hodder*, the owner of the fund, had not assented to the drawing or accepting of the bill, and had afterwards required the money to be paid to her, pursuant to the order of the Court of Chancery, the acceptance was not binding. Lord *Tenterden*, however, was of opinion that the defendant must pay the bill, and afterwards resort to the plaintiff upon his indemnity. A rule nisi having been obtained by *Gurney* in last Michaelmas term for entering a nonsuit,

*Scarlett*, A. G., and *Patteson*, now shewed cause. The plaintiff had a lien upon the fund for his advances. This was a sufficient consideration for the defendant's acceptance. There was no evidence of any dissent on the part of Mrs. *Hodder*. If the defendant had been prepared with the money, (which he ought to have had in his hands,) he would have paid the plaintiff in cash, instead of giving him an acceptance. If the money had been actually paid, the defendant could not have recovered back the amount in an action for money had and received; and if not, he can have no defence to the present action. If a party having accepted a bill *afterwards* discovers that the funds in his hands are not applicable to the discharge of the bill, this may be a good defence to an action brought by the drawer; but here the defendant knows the circumstances, and obtains an indemnity. It is quite clear from the correspondence, that at the time the defendant accepted this bill, he was fully aware of the circumstances under which it had been drawn.

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*Gurney and D. Pollock, contra.* The money in the defendant's hands arose from a settlement to the use of the wife; and, by an order of Court, it was to be paid to the wife, though the plaintiff afterwards obtained an order for its being paid to Captain and Mrs. *Hodder*. The plaintiff had obtained the bill by misrepresentation. The attention of the Court was not drawn to the terms of the indemnity. If the money had been paid, it would have been necessary to resort to a cross-action upon the indemnity. After the bill became due, and whilst the payment stood over, Mrs. *Hodder* interposed. The plaintiff had been advancing money at the request of Captain *Hodder*, for which he obtained his receipt. No advance was made by the plaintiff at the time the bill was given. It was accepted upon a prior consideration. [Lord *Tenterden*, C.J. It was advanced with a view of being paid out of the money in Chancery.] The plaintiff could not in justice claim more than was in the defendant's hands.

LORD TENTERDEN, C. J.—Upon further consideration I agree that the decision, that the plaintiff might recover on this bill, proceeded on a mistake. Leaving the defendant to sue upon his indemnity would lead only to circuity of action. It is possible to give a construction to the letter, independently of recovery on the bill in the first instance by the plaintiff. The bill being payable to order, it might be necessary to resort to the indemnity.

BAYLEY, J., and LITLEDALE, J., concurred.

PARKE, J.—The defendant would be entitled to recover the amount back from the plaintiff under the indemnity. To hold, therefore, that the present action is maintainable, would merely introduce circuity.

Rule absolute.

BUCHANAN and others, Assignees of DUFF and BROWN,  
Bankrupts, v. FINDLAY and others.

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**ASSUMPSIT** for money had and received before and after the bankruptcy. Plea, non assumpsit; and issue thereon. At the trial before Lord *Tenterden*, C. J. at the sittings at Guildhall in Easter term, 1827, a verdict was found for the plaintiffs, subject to the opinion of the Court upon the following case:—The bankrupts carried on business in Liverpool under the firm of *Duff and Brown*, from the 1st of January, 1822, until the 1st of February, 1826, when a commission issued against them, under which the plaintiffs were duly appointed assignees. The defendants carried on business in London under the firm of *Findlay, Bannatyne*, and Co., for several years prior to the 23d January, 1826, on which day they suspended their payments. The bankrupts and the defendant *Findlay* carried on business at Liverpool under the firm of *Duff, Findlay*, and Co. up to the 31st December, 1821, on which day that firm was dissolved, and the bankrupts began to trade under the firm of *Duff and Brown*, the defendants being then under acceptances for the firm of *Duff, Findlay*, and Co., and for their accommodation, to the amount of 50,000*l.* and upwards. On the dissolution of the firm of *Duff, Findlay*, and Co., it was agreed between the partners in that firm and the defendants, that *Duff and Brown* should continue to draw bills on and to be accepted by the defendants until the assets of the dissolved firm of *Duff, Findlay*, and Co. could be collected to retire such acceptances, and discharge the debts of that firm. *Duff and Brown* accordingly drew bills from time to time, which the defendants accepted. On the 23d of January, 1826, the defendants were under acceptances to *Duff and Brown*, upon bills drawn on account of the dissolved firm of *Duff, Findlay*, and Co., to the amount of 50,000*l.* and upwards. On that day the bankrupts at Liverpool

*A.* at Liverpool remits a bill to *B.* in London, with directions to discount it and pay part of the proceeds to *C.* and apply the residue in discharge of a debt due to *B.* from *A.* and *D.* jointly. *B.* did not get the bill discounted but received the money when it became due, before which time *A.* stopped payment and desired that the bill might be returned to him. *A.* was declared bankrupt before the money was received on the bill. The whole proceeds of the bill are recoverable in an action for money had and received to the use of *A.*'s assignees.



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wrote to the defendants in London as follows:—" Inclosed please to receive two bills, value 1740*l.*, which place to our credit; and we have to request that you will pay in cash and in course 900*l.* on our account to Messrs. *Ransom*, and Co., bankers, and that you will place the balance when discounted to the credit of *Duff, Findlay*, and Co. with you."

The special case then set out a long correspondence between the bankrupts and the defendants in January and February, 1826, in which the bankrupts required the bills to be returned as the defendants had failed to appropriate them in the manner directed by the bankrupts. These bills became due in March, 1826. On the 23d of January, 1826, the bankrupts were indebted to the defendants in the sum of 2000*l.* and upwards, of which 800*l.* has been since received; and the bankrupts ever since have been and still are indebted to the said defendants in the sum of 1200*l.* without taking into account the moneys which are the subject of the present action. The firm of *Duff, Findlay*, and Co. was on the 23d of January, 1826, and ever since has been and still is indebted to the defendants in a cash balance exceeding the said sum of 1740*l.* besides the acceptances before mentioned. The defendants, on the 25th January, 1826, the day on which the remittance for 1740*l.* reached their hands, made entries in their bill book and their account current book, in the respective accounts of *Duff* and *Brown*, and of *Duff, Findlay*, and Co. of which the following are copies:—

In the account current of *Duff* and *Brown*.

| Drs.                      | Messrs. <i>Duff</i> and <i>Brown</i> . |    |    | Crs.                                   |      |    |    |
|---------------------------|----------------------------------------|----|----|----------------------------------------|------|----|----|
| 1826. January 25.         | £.                                     | s. | d. | 1826. January 25.                      | £.   | s. | d. |
| To Discount               | 10                                     | 3  | 9  | By <i>Ryle</i> on <i>Whitmore</i> ,    |      |    |    |
| To <i>Duff, Findlay</i> , |                                        |    |    | due 7th March,                         | 240  | 0  | 0  |
| and Co. per desire        | 829                                    | 16 | 3  | By <i>Crewsdon</i> on <i>Esdaile</i> , | 1500 | 0  | 0  |
|                           | 840                                    | 0  | 0  |                                        | 1740 | 0  | 0  |

In the account current of *Duff, Findlay, and Co.*

Messrs. *Duff, Findlay, and Co.*

Crs.

1826, January 25.

£. s. d.

By *Duff and Brown*, per desire . . . 829 16 3

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The defendants, in April, 1826, made entries in their journal and ledger in the same manner as the above in the respective accounts of *Duff, Findlay, and Co.*, and such entries still remain. It has always been the practice of the defendants to enter in the first instance all remittances in their bill book and account current book as the transactions have taken place, and afterwards to make entries in their other books. The defendants did not in fact discount the bills for 1740*l.* but retained both in their hands until they became due, when they received the amount thereof. This receipt was previous to the commencement of this action.

*Patteson*, for the plaintiffs. First, the remitter of the bills had, before discount, a right to countermand the application of them. Secondly, this is not a case of mutual credit. [*Bayley, J.* The defendants are liable, therefore, to refund the 900*l.*] It is submitted that they are liable to refund the whole amount, 1700*l.* The bills were remitted on a specific account, for the defendants to get them discounted, and to apply 900*l.* to *Ransom*, and the remainder to the defendants. It appears that the bankrupts were indebted largely to the defendants at the time the remittance was made; but it will hardly be contended that this circumstance gave them a right to repudiate the terms of the remittance, and to apply it in satisfaction of their debt. In *Humphries v. Wilson* (a) it was held by *Dallas, C. J.* that the right of the defendant to retain the bill which had been sent to him by the bankrupt, was limited by the purpose for which he had consented to receive it, the property remaining in the remitter until the bill was discounted. *Giles v. Perkins* (b), *Thompson v. Giles* (c). When a payment is made with a trust attached,

(a) 2 Stark. N.P.C. 566. (b) 9 East, 12. (c) 3 D.& R. 733; 2 B.&C. 422.

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and the object of the payment fails, the money remains the property of the payer. In *Toovey v. Milne* (a) the Court implied a stipulation that the money should be repaid if the creditors could not be settled with. There an act of bankruptcy had, by relation, been committed at the time of the loan. The Court held that where a payment is made with an expressed trust, the money must be repaid if the object fail. [Parke, J. In *Toovey v. Milne* the question was whether the property had vested in the assignees; and it was held that it had not so vested. All that was decided in that case was, that money clothed with a trust did not pass to the assignees. *Williams v. Everett* (b), and *Grant v. Austin* (c), shew that the property does not vest in a third party immediately, but remains in the remitter until some act is done. [Lord Tenterden, C.J. In this case no bankruptcy had taken place. The directions, therefore, were good in point of law and in point of fact, but the defendants chose to say that they could not get the bill discounted.] Their not doing so is a circumstance favorable to the plaintiff. The case of *Key v. Flint* (d), and the subsequent case of *Flint ex parte* (e), are very material upon the second point. The principle of mutual credit is there fully gone into; and it was held not to apply; and the decision of the Court of Common Pleas was fully confirmed in the Court of Chancery. In *Rose v. Hart* (f), the statement is very confused, but it will be useful to refer to it for the judgment of Gibbs, C.J., who, after going fully through the cases bearing on the subject says (g), "But it is first to be considered whether these cases may not be supported by a construction of the statute, which will leave the opinion of Lord Hardwicke, in the case of *Ex parte Ockenden* (h),

(a) 2 B. & A. 683.

(b) 14 East, 582.

(c) 3 Price, 58.

(d) 8 Taunt. 21.

(e) 1 Swanst. 30.

(f) 8 Taunt. 499; reported also 2 B. Moore, 547.

(g) 8 Taunt. 505; and see 2 B. Moore, 550.

(h) 1 Atk. 235.

untouched. By the 28th section of 5 Geo. 2, c. 30 (a), it is enacted, 'that where it shall appear to the said commissioners or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt may be set against another; and what shall appear to be due on either side on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side respectively.' Something more is certainly meant here by *mutual credits* than the words *mutual debts* import; and yet upon the final settlement it is enacted merely that one *debt* shall be set against another. We think this shews that the legislature meant such credits only as must in their nature terminate in debts; as where a debt is due from one party and credit given by him to the other for a sum of money payable at a future day, and which will then become a debt; or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other. In such case the credit given by the delivery of the property must, in its nature, terminate in a debt; the balance will be taken on the two debts, and the words of the statute will in all respects be complied with. But where there is a mere deposit of property, without any authority to turn it into money (b), no debt can ever arise out of it; and, therefore, it is not a credit within the meaning of the statute." In *Easum v. Cato* (c) the same rule was adopted, and it was afterwards confirmed in *Sampson v. Burton* (d). Here the transaction never would have terminated in a cross debt, as the bills were remitted for the purpose of being applied wholly to the use of other

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(a) Repealed by 6 Geo. 4, c. 16.

(c) 1 D. & R. 530; 5 B. & A. 861.

(b) *q. d.* for the benefit of the depositary.

(d) 2 Bro. & Bingham, 89; 4 B. Moore, 515.

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persons, viz. 900*l.* to *Ransom*, and Co., and the residue to the credit of *Duff, Findlay*, and Co. If the bankrupts had made a cash remittance, and credit had been given in the defendants' books to *Duff, Findlay*, and Co., it could not have been contended that the property did not pass; but here the remittance consisted in bills, which, before they were discounted, the remitters desired to have back. The 500*l.* never could have constituted a debt from the defendants to the bankrupts. [*Littledale, J.* My opinion is, that if a man receive a remittance, of which 500*l.* is to be applied to his own use, he cannot take that 500*l.* unless he pay over the residue according to the terms of the remittance.] By refusing to pay over, he repudiates the whole. If this be so with respect to a cash remittance, the case is much stronger where the remittance is made in the form of an entire security, which is to be converted into money for the benefit of particular persons designated by the remitter. The receiver is not to pick and chuse. Being directed to pay *A.* and *B.*, if he refuse to pay *A.* he is not at liberty to pay *B.*, but must return the bills. If it be objected that the assignees should have brought trover, the answer is that the conversion being after the bankruptcy, the assignees are entitled to recover the proceeds of the bill in the present form of action, which is for money had and received to their use, not to the use of the bankrupts, so as to let in a set-off.

*Campbell*, contra. This action cannot be maintained. Here was an appropriation by the authority of the bankrupts as to the 829*l.* 16*s.* 3*d.* It was a power coupled with an interest, and, therefore, could not be countermanded. This is not an action of trover for the bill, as in *Rose v. Hart*. The action for money had and received affirms what has been done (a). [*Lord Tenterden, C. J.* So far as the plaintiffs seek to recover as for money had and received to the

(a) As to disaffirmance by assignees, see *Brewer v. Sparrow*, ante, i. 2; 7 B. & C. 310.

use of the bankrupts. By the count on promises to themselves as assignees, they disaffirm the transaction.] No mode of declaring would take away the right of set-off. If there had been an express promise on the part of the defendants to pay the 900*l.* to *Ransom* and Co., and the defendants, after discounting the bills, had refused to pay the 900*l.* to *Ransom* and Co., the defendants might have pleaded a set-off to the bankrupts' action for money had and received; as where goods are sold for ready money, if the vendor part with the possession without payment he lets in the purchaser's set-off. *Lechmere v. Hawkins* (a), *Atkinson v. Elliott* (b), *Eland v. Karr* (c), *Cornforth v. Revett* (d). [*Bayley, J.* If trover had been brought there could have been no set-off; and it was competent to the assignees to waive the tort, and bring money had and received. *Littledale, J.* Or they might have brought special assumpsit.] In *M'Gillivray v. Simpson* (e), which was an action brought by the assignees of *Inglis* and Co., against a broker for the proceeds of a sale of timber, which had been placed in the defendant's hands upon a promise that he would pay over the net proceeds to the bankrupts, this Court held that the broker was entitled to retain the proceeds of the sale against a prior debt. In *Rose v. Hart* the Court of Common Pleas merely decided that the subject of mutual credit must be a money demand; thereby qualifying the former decision of the same Court in *Olive v. Smith* (f), by confining the principle of mutual credit, (which had been supposed to extend to all cases of lien,) to such transactions as would necessarily terminate in money. The defendant rests his case upon 6 *Geo.* 4, c. 16, s. 50, which corresponds with 46 *Geo.* 3, c. 135, s. 3. *Humphries v. Wilson* (g) was an

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(a) 2 *Esp. N.P.C.* 625.(b) 7 *T.R.* 378.(c) 1 *East*, 375.(d) 2 *M. & S.* 510, *S.P. Taylor v. Okey*, 13 *Ves.* 180. But see *Fair v. M'Iver*, 16 *East*, 130,138; *Peele v. Northcold*, 7 *Taunt.*479; 1 *B. Moore*, 178.(e) 9 *D. & R.* 35.(f) 5 *Taunt.* 56.(g) 2 *Stark. N.P.C.* 566.

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action of trover in a case of actual fraud. A case of mutual credit has frequently been held to arise notwithstanding an express promise to pay. *Atkinson v. Elliott* (a). [Lord Tenterden, C. J. Had the bill in that case fallen due before the bankruptcy?] A commission was sued out two days after the bills were paid, but it must have issued upon a prior act of bankruptcy. These cases appear startling at first, because they seem to allow a party to take advantage of his own breach of an implied undertaking. In *Chalmers v. Page* (b) policies were deposited by A. at his bankers to secure 800*l.* Afterwards B., at the desire of A., engaged to take the policies and settle with the underwriters, and to pay the amount to A.'s account with the bankers. Under this arrangement B. received 949*l.* A. being indebted to B. in a larger sum, and becoming bankrupt, B. refused to pay over the money, and it was held that the assignees of A. could not, even with the assent of the bankers, sue B. for the breach of his engagement. In delivering the judgment of the Court, Abbott, C. J. says, "Upon the argument in this case it was contended on the part of the defendant, that considering this letter of the defendant's to be an agreement entered into by him for the benefit of Prescott and Co., the interest in the contract and the right to sue would not pass under the commission to the assignee of the bankrupt; and if so, the plaintiff could not maintain the present action; or if it is to be considered as an agreement for the benefit of the bankrupt, then, although the assignee might sue, yet if he did, the defendant, under the statute of 5 Geo. 2, c. 28, would be entitled to set off his demand on the bankrupt." The defendants will avail themselves of the second alternative. His lordship goes on to say, "The defendant (plaintiff) is, therefore, put in this dilemma by the argument: either he is not competent by law to maintain this action, or if he is competent, the defendant has a good answer to it." [Bayley, J. In that case the promise was for the

(a) 7 T. R. 378.

(b) 3 B. &amp; A. 697.

benefit of the bankers.] It is submitted that it was for the benefit of both the bankers and of A.

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*Patteson*, in reply. In the cases cited no prejudice arose to the bankrupt's estate; here, there would be a prejudice to the bankrupts and to the creditors. In all the cases cited, the demand would come to a debt according to the rule. Here, if the purpose for which the remittance was made had been complied with, the defendants never would have been accountants to the bankrupts. This case is to be treated as if *Duff, Findlay*, and Co. were third persons as much as *Ransom* and Co.; as if the money was to be paid to *Duff, Findlay*, and Co. who were to pay the defendants out of it. The cases as to express promises were decided upon the ground of set-off, which was considered equivalent to ready money. In carrying bills to the credit of *Duff, Findlay*, and Co. the defendants contradict their own letter, in which they say they cannot discount the bills. If the entry in the books amount to any thing it is a discounting of the bills by the defendants themselves.

LORD TENTERDEN, C. J. now delivered the judgment of the Court.—This was an action for money had and received to the use of the plaintiffs as assignees of *Duff* and *Brown*. At the trial a verdict was found for the plaintiffs, subject to the opinion of this Court upon the following case: [his Lordship then stated the facts of the case, and the points raised in the argument, and proceeded thus:] All the cases which bear upon the subject were cited; the nearest to the present is that of *Key v. Flint* (a) in the Court of Common Pleas, which also came before the Lord Chancellor in *Flint ex parte* (b). There is no substantial difference between that case and the present. The form of action in that case was trover; but if the bankrupt or the assignees could maintain trover for the bills, they might maintain such an action as the present for the proceeds of

(a) 8 Taunt. 21.

(b) 1 Swanst. 30.



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those bills. The cases cited on behalf of the defendants are all distinguishable from the present. Where a set-off has been allowed, notwithstanding a promise to pay ready money, the bankrupt might have insisted upon payment in the first instance, but by parting with the goods he raised a case of mutual credit and cross demands. In *Chalmers v. Page* (a) the defendant could not be charged as a wrongdoer in retaining policies delivered to him for the purpose of receiving payment. In *M<sup>c</sup>Gillivray v. Simpson* (b) the sale was not a wrongful act. In *Atkinson v. Elliot* (c) no offer was made before the bill became due to pay the defendant what he was entitled to retain out of the proceeds. In all these cases the claim arose out of the nonpayment of money; but here, as well as in *Flint's* case, the bills being remitted for a specific purpose, the defendants were bound to return them as soon as they declined to appropriate them as directed by the letter in which the bills were remitted. The defendants did not procure the bills to be discounted, upon which they were required by the bankrupts to return the bills to them; this they were bound to do. Where goods or bills are deposited for a specific purpose, which the bailee refuses to carry into effect, he is bound to return them upon demand to the bailor, whose property is not divested until the condition be performed. If the defendants had procured the bills to be discounted and had paid over the 900*l.* to *Ransom* and Co. according to the directions of the letter, they would have been entitled to the benefit of the surplus 829*l.* 16*s.* 3*d.* by applying it to the account of *Duff, Findlay* and Co.; but as the bills were not discounted, and the 900*l.* was not paid, the defendants cannot have that benefit, the consideration for which they have chosen to withhold. The verdict, therefore, must stand for the whole amount of the proceeds of the two bills.

Postea to the plaintiffs.

(a) 3 B. & A. 697.

(b) 9 D. & R. 35.

(c) 1 T. R. 378.

BAYLEY Ex parte, in the matter of HARPER.

1830.

**JOHN BAYLEY** applied to *Harper* to take his son *William* as an articled clerk. *Harper* having already two clerks, *William Bayley* was articled to *Watson*, *Harper's* partner. *Watson* being unwell at the time the articles were executed, the premium, 200*l.*, was paid to *Harper*, who carried the amount to the credit of *Watson's* account with himself<sup>(a)</sup>, *Harper* being a creditor of *Watson* to a much larger amount. At the end of two months *Watson* died. The parties being unable to agree as to the terms on which *William Bayley* should be assigned to a new master, *Manning*, in Easter term last, obtained a rule calling upon *Harper* to shew cause why he should not return to *John Bayley* a part of the premium paid with his son. This rule was referred to the master, who now reported that *Harper* was liable to refund, and that he was of opinion that 180*l.* was a proper sum to be returned.

*A* and *B.* are partners as attorneys. *C.* is articled to *A.* who receives the whole premium and dies pending the clerkship. *C.* is to be considered as substantially the clerk of a firm vesting in *B.* by survivorship; and *B.* is liable to return an adequate proportion of the premium.

*Taunton* and *Whateley* now excepted to the master's report. The master should be directed to review his report unless the Court will of its own authority overrule the master's decision. The money, though paid into the hands of *Harper*, was received by him as agent of *Watson*. Supposing this to be a partnership transaction, there is no reason why Mr. *Harper*, as survivor, should be saddled with this liability. [*Bayley, J.* The whole is put into a fund over which *Harper* has the control.] Still it is not just to throw the whole burthen upon *Harper*. [*Bayley, J.* *Harper* may resort to his remedy over, if by the terms of his partnership and the state of accounts between himself and his partner,

(a) There was some doubt upon the affidavits whether this account was a private or a partnership account. Taking it either way the effect of the entry was to give *Watson* the benefit of the whole 200*l.*, *Harper*, on the first supposition, or the firm of *Watson* and *Harper* on the second, deriving no other advantage from the transaction than the obtaining payment from *Watson* of a part of *Watson's* debt.

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he is entitled to relief.] The liability to the whole charge by survivorship is a principle not admitted in equity, although this application is addressed to the equitable jurisdiction of the Court. It is not a case in which any action would have lain at law. Where a party comes for a favour he ought to do equity. *Harper* has no opportunity of answering the statements in the master's report. [*Bayley, J.* It was competent to him to enter into an explanation before the master.] The receipt was signed by *Watson*, and the clerk was liable to serve *Watson* only. [*Lord Tenterden, C. J.* It does not appear in what manner the receipt was given.]

**LORD TENTERDEN, C. J.**—This case is not to be determined according to any strict rule of law. The jurisdiction of the Court over its officers is to be exercised according to equity and conscience. Considering the circumstances of this case in connexion with the act of parliament, which prohibits attorneys from having more than two clerks, *William Bayley*, though bound in name to one only, was in reality and conscience clerk to both, bound to serve both, and entitled to be instructed by both. One master being dead and the other not being able to take this young man as a clerk, the latter is bound to refund. I am not prepared to say that the master has done wrong in directing so large a sum as 180*l.* to be refunded.

**BAYLEY, J.**—It was easy for *Harper* to state what was the bargain between himself and *Watson* respecting the fees paid by clerks. He gives no information on this point. The Court is, therefore, warranted in treating this as a partnership transaction.

**LITLEDALE, J.** concurred (a).

Rule absolute.

(a) *Parke, J.* was absent.

## HAIRE v. WILSON.

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**CASE**, for the publication of the following libel in "The Hull Advertiser." "In the Insolvent Debtors' Court, London, yesterday week, *Francis Harrison*, late of Humbledon, was opposed by Mr. *Beckwith*, executor of the late *W. Dobson*, of Brandsburton. The grounds of opposition were, first, that the insolvent had made away with his property by giving several valuable horses to his sons, mere boys, and, in collusion with his landlord, *W. Haire*, (the plaintiff,) setting up a fictitious distress; and secondly, that he had raised a vexatious defence to an action at law in which Mr. *Beckwith* was plaintiff. After a long examination, in the course of which the insolvent swore that the distress was a *bonâ fide* one for rent actually owing, and that there was no agreement between himself and his landlord, the case was adjourned, with an order for the insolvent to produce all papers and documents relative to the distress and the value of his property, and also to produce his landlord." Plea, not guilty; and issue thereon. At the trial at York, before *Hullock*, B., the publication was proved and no evidence was given that the proceedings alluded to had taken place. It was left by the learned Judge to the jury, whether they believed that the writer of the paragraph intended to injure the plaintiff; and they were told, that if they believed that the writer did so intend, they ought to find a verdict for the plaintiff. Upon this direction the jury returned a verdict for the defendant. The learned Judge being afterwards of opinion that the paragraph in question, independently of any evidence of intention, amounted to a libel, directed that the entry should be of a verdict for the plaintiff, damages one shilling, reserving leave for the defendant to move to enter the verdict according to the original finding. A rule to this effect having been obtained,

Where, in a civil action, the tendency of an alleged libel is to injure the plaintiff, it is the duty of the judge to state to the jury that the publication is a libel, without leaving it to them to consider whether it was the intention of the defendant to injure the plaintiff.

*Brougham* and *Starkie* now shewed cause. The paragraph in question charges the plaintiff with the commission

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of a fraud. This is of itself a legal injury. The learned Judge, therefore, ought to have directed the jury that the paragraph was a libel in point of law, and that they were merely to consider whether the defendant had published this libel, and whether the innuendoes in the declaration were proved; and that if they were satisfied upon those two points, it would become their duty to assess the plaintiff's damages. In *Bromage v. Prosser* (a) it was decided, that in actions for defamation, malice is a legal inference from the fact of publication, except where the slander is *prima facie* excusable by reason of the occasion of the publication, in which case express malice must be shewn (b). Here the publication and the innuendoes were not disputed, and nothing appeared from which it could be inferred that the publication was excusable. No question of fact arose. The liability of the defendant was an inference of law.

*F. Pollock* and *Alderson*, *contra*. The paragraph, though injurious, perhaps, to *Harrison*, contained no libel on the plaintiff. The intention here became material. Whether libel or no libel would be a question for the jury.

Lord TENTERDEN, C. J.—The paragraph in question states that *Harrison*, was charged with colluding with his landlord in setting up a fictitious distress, and that *Harrison* was ordered to produce his landlord. Such a statement, I think, was libellous, and entitled the landlord to bring an action. I think, therefore, that the question of intention was immaterial, and that the learned judge's direction cannot be supported in point of law. The jury should at least have been also told that the publication was a libel. If the question of intention could have been left to a jury, they should have been informed that every man intends that to be produced which is the natural consequence of his own voluntary act. Otherwise it might be contended, that where a man takes up a stick and inflicts a blow, the right of the party struck to sue the striker would depend upon the intention with which the blow was given.

(a) 6 D. & R. 396, 4 B. & C. 247. (b) Vide *Child v. Affleck*, ante, 338.

BAYLEY, J.—The paragraph contained an imputation that the plaintiff colluded with the insolvent in putting in a fictitious distress. This amounted to a libel.

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LITLEDALE, J.—If the publication tended to injure the plaintiff, the law will presume that it was the intention of the publisher to produce that injury. There can be no doubt that a publication having that tendency is a libel.

Rule discharged.

MARSHALL and another, Executors, &c. v. WILDER, in error.

*WILDER*, the plaintiff below, declared in the Common Pleas on promises by the testator for goods sold and delivered to him, and on a promise by the defendants, as executors, on an account stated by them of moneys due from the testator. Plea, *non assumpsit* to all the promises, and *plenè administravit*. The plaintiff took judgment upon the last plea of assets *quando*, and joined issue on the *non assumpsit*. At the trial a verdict was found for the plaintiff on the promises made by the testator, and for the defendants on the account stated. Judgment was entered up for the whole of the damages and costs, “to be levied of the goods and chattels which were of the testator at the time of his death in the hands of the defendants, as executors, to be administered, if they have so much thereof in their hands to be administered, and if they have not so much thereof in their hands to be administered, then the sum of 93*l.* 6*s.* 2*d.* of the damages aforesaid, being for the costs and charges aforesaid, to be levied of the proper goods and chattels of the defendants.” Errors being assigned on this judgment and *in nullo est erratum* pleaded, the errors were now argued by

A plaintiff who takes judgment of assets *quando* upon *plenè administravit*, and obtains a verdict on *non assumpsit* testator, is entitled to judgment for the costs *de bonis testatoris, et si non, de bonis propriis*.

*Wightman*, for the plaintiffs in error. If the plaintiff below was entitled to costs at all, they should have been awarded to be levied of the assets *quando acciderint*. If the plaintiff had

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joined issue on the plea of *plenè administravit* instead of taking judgment of the future assets, and had gone to trial on both issues, and the issue on *plenè administravit* had been found for the defendants, they would have been entitled to the costs of the action. This was expressly decided in *Edwards v. Bethel* (a). [Bayley, J. In that case there was a judgment of *eat inde sine die*, and the action was completely at an end.] The question is whether the defendants should be put in a different situation by a confession on the part of the plaintiff of the plea of *plenè administravit* than they would have been if its truth had been ascertained by a verdict. An executor is liable *de bonis propriis* where he pleads a false plea within his own knowledge; but a plea of *non assumpsit testator* is not sufficient to charge an executor *de bonis propriis*. *Erving v. Peters* (b). In that case the judgment was in the same form as here. The declaration suggested a *devastavit*. Buller, J. says, "It is true that where the defendant pleads a plea of *plenè administravit* the plaintiff may admit the plea to be true and pray judgment *de bonis et cattallis* of the testator, *et quæ ad manus* of the executor *in futuro devenerint administrand*, *Mary Shipley's* case (c), *Noell v. Nelson* (d), but that is a different judgment, from what is given upon a *nil dicit*, or a confession of the action, for that is the same one given upon the *plenè administravit*, where there is a verdict for the plaintiff, viz. to recover *de bonis testatoris, si tantum in manibus habuit* (*habuerit*) *administrand*. From which we can infer that if he hath fully administered before, he is not affected by the judgment; but it is to be considered that though it be found upon a *plenè administravit* that the defendant hath assets in his hands, there is no reason to levy the money upon the executor's own goods unless he hath wasted, and that being matter of fact, it must appear upon record, and judgment must be given thereupon before his own goods can be affected. But if a *fieri facias de bonis testatoris* doth issue upon a judgment had against the executor upon a *plenè administravit* pleaded,

(a) 1 B. & A. 254.

(b) 3 T. R. 686, 691.

(c) 8 Co. Rep. 134.

(d) 2 Saund. 236.

if the goods cannot be found that were the testator's, namely, if the executor will not expose them to the execution, the sheriff may return a *devastavit*, it being found by verdict that he had assets. Now then, since the pleading of *riens enter mains* would have been a good bar to the action, (and if the plaintiff should admit it, he should not have a judgment to have a present execution); yet the defendant by not pleading that plea, hath left the plaintiff to have a judgment, upon which a present execution is to issue, which he could not have had unless the defendant had assets; and such an admission is as good as a finding of a jury upon a *plenè administravit*." The form of the judgment in this case must have been taken from *Dearne v. Grimp* (a). [Bayley, J. Where an executor pleads a plea which is false within his own knowledge, he is liable to the debt as well as to the costs; if the plea be not false the judgment is that the costs shall be levied *de bonis testatoris, et si non, de bonis propriis*; when a *devastavit* is suggested, the executor is made liable to the debt and costs.] In *Dearne v. Grimp* the defendant moved for leave to withdraw his plea of *non assumpsit*, which plea he had pleaded together with *plenè administravit præter*; and the decision of the Court proceeded upon the report of the prothonotaries, that if the cause had gone to trial in that state, and a verdict had been found for the plaintiff on the first plea, and for the defendants on the second, the defendants must have been liable to costs *de bonis propriis*; but that if only the second plea had been originally pleaded, the plaintiff, who must at all events have judgment *de bonis testatoris, cum acciderint*, would only have his costs eventually *de bonis testatoris*. In *Hindsley v. Russell* (b) the defendant pleaded *non assumpsit, plenè administravit*, and *plenè administravit præter*, on which last plea the plaintiff took judgment of assets *quando*; the verdict was ultimately entered for the plaintiff on the general issue, and for the defendants on the *plenè administravit*; it was held that the plaintiff being at all events entitled to judg-

(a) 2 W. Bla. 1275.

(b) 12 East, 234.



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ment of assets *quando*, and having been compelled, by the defendant's pleading *non assumpsit*, to go down to trial, was entitled to the general costs of the cause. [*Bayley, J.* If *Hindsley v. Russell* was rightly decided it is an authority against the defendant.] The case of *Hindsley v. Russell* was reconsidered in *Edwards v. Bethel*, where Lord *Ellenborough* says, "The defendant ought not to be placed in a worse situation by having pleaded several pleas than she would have been if she had pleaded only one. The plea of *plenè administravit* being, therefore, of itself a full and complete answer to the action, the defendant is entitled to the *postea* and to the general costs of the trial." And *Bayley, J.* says, "The plaintiff here claims payment only out of one fund, viz the assets of the testator; and the defendant by proving that those are fully administered, shews that there is no such fund out of which the plaintiff's demand may be satisfied." Then if the plaintiff chuses to admit the truth of the plea, the defendant ought to be in the same situation as if it had been ascertained by verdict that the fund had been exhausted.

*Follett*, contra, was stopped by the Court.

LORD TENTERDEN, C. J.—I am of opinion that the judgment of the Court of Common Pleas is right and must be affirmed. If the defendants had pleaded *plenè administravit* only, the plaintiff might have taken judgment against the future assets. The defendants did not take that course, but thought fit to plead that the testator never promised; which plea compelled the plaintiff to bring down the record for trial. The defendants ought, therefore, to pay the costs occasioned by their plea. It is true, that if issue had been taken upon both pleas, and one had been found for the defendants, the same course would have prevailed as where two pleas are pleaded, and one of them, which goes to the whole action, is found for the defendants. But that is not this case. The plaintiff must go on to trial of the issue on *non assumpsit*. The judgment of future assets would be merely a form on

the record and have no effect until the existence and the amount of the debt were proved. The plaintiff was bound to try the issue which the defendants very improvidently raised.

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BAYLEY, J.—*Edwards v. Bethel* merely decided that the plaintiff was entitled to judgment on the whole record, though the issue of *non assumpsit* was found for the plaintiff. Here the action is brought upon promises made by the testator, and upon a promise alleged to have been made by the defendants. The plea denying the latter promise, if found for the plaintiff, would have been false within the defendant's own knowledge. It was contended that an executor is not liable to costs unless he plead a false plea. Where a plea is false to the executor's own knowledge, the judgment is against the executor in the first instance for the debt as well as for the costs. If the plea be not false to the executor's own knowledge, the judgment is that the plaintiff recover his debt and costs *de bonis testatoris, et si non*, to levy the costs, as distinct from the debt, upon the goods of the executor. This seems to me to reconcile the cases. The plaintiff here is entitled to judgment *de bonis testatoris*. It is said that it is admitted that there are no assets. There is an interval between the plea and judgment, and in that interval assets may have come to the executor's hands. I believe the usual course is for the defendant to withdraw the plea of *non assumpsit* when the plaintiff takes judgment of future assets.

LITTLEDALE, J.—I am of the same opinion. If the plaintiff succeed on the general issue in this state of the pleadings, he is entitled to recover his costs from the executor. By pleading *non assumpsit*, the defendant compels the plaintiff to go to trial. In 1 Roll. Abr. 933 (a), it is said, if the executor at the first day, namely, at the return of the summons, acknowledge the action, and says that he has no assets, judgment shall be for the costs and damages

(a) Line 15; translated in 11 Vin. Abr. 391, pl. 13.

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*de bonis testatoris* only, if that be true. *Dearne v. Grimp* is in some measure overruled by *Edwards v. Bethel*. In *Hullock on Costs*, 209, it is said, "but if the plaintiff take judgment of assets *quando acciderint* upon the plea of *plenè administravit*, and proceed to trial upon the plea of non assumpsit, and obtain a verdict thereon, he will be entitled to costs against the defendants *de bonis propriis*; and, therefore, an executor or administrator ought not to plead *non assumpsit* or other general issue without a good defence thereon."

Judgment affirmed (a).

(a) M. 34 H. 6, fo. 24, b. pl. 42.

"*Yelverton*. Where executors plead *plenè administravit*, and it is found accordingly, the plaintiff shall recover so much of the goods of the deceased; and if upon the *fi. fa.* the sheriff return that they have converted the said goods, now they shall be charged of their own goods; because this act is of their own wrong, &c.; but where they plead *plenè administravit*, and it is found by a verdict that they have nothing in their hands, in that case the plaintiff shall take nothing by his writ.

*Markham*. That is true, and the plaintiff is put to his new writ of debt when they have anything, &c.

*Fortescue*. If it be found that they have any manner of parcel in their hands, the plaintiff, afterwards, when they have any thing, shall have a *sci. fa.* out of the record for the remainder, &c.

PARSON, J.—Truly, if it be found that they have nothing in their hands, generally, still at another time afterwards, when they have

anything, the plaintiff shall have a *sci. fa.* out of the same record to have execution of the debt; and there are many such precedents in the Common Pleas."

So in T. 33 H. 6, fo. 24, pl. 1, it was said by one of the prothonotaries, "that if an executor bar the plaintiff by having nothing in his hands, and the executor *haps* goods of the testator afterwards, the plaintiff, on a surmise, shall have a *scire facias* upon the same record to have execution of those goods." *Quod fuit concessum per omnes justiciarios*.

It is, however, said, "that if in a writ of formedon the tenant plead the warranty of the demandant's ancestor, and plead further that assets descended &c., and the demandant taketh issue that assets descended not, which issue is found for the demandant, whereupon he recovereth, the tenant, albeit assets doe after descend, shall never have a *sci. fa.* upon the said judgment; for that by his false plea he hath lost the benefit of the said statute (of Gloucester)." Co. Litt. 366 b.

JONES and another, Assignees of BURY and SYKES, Bankrupts, v. YATES and YOUNG.

Same v. Same (a).

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THE first of these cases was an action of trover for three bills of exchange, upon a conversion after the bankruptcy. Plea, not guilty. At the trial, before Lord *Tenterden*, C. J. at the adjourned sittings at Guildhall after Hilary term, 1828, the following facts appeared:—In 1824 the bankrupt, *Sykes*, who then carried on business in partnership with the defendants under the firm of *Sykes and Yates*, proposed to dissolve this partnership. The accounts were accordingly wound up; but it appearing that *Sykes* had considerably overdrawn his account, *Yates* required that before such dissolution, the debt from *Sykes* to his partners should be discharged. On the 1st of January, 1825, *Sykes* entered into partnership with *Bury*; shortly after which, *Sykes* and *Bury* drew the three bills in question, payable respectively in September, 1825, and in May, and July, 1826; which were duly accepted. On the 24th of January, 1825, *Sykes*, without the knowledge of *Bury*, indorsed these bills first in the names of *Sykes* and *Bury*, and afterwards in the names of *Sykes* and *Yates*, and then handed them over to *Alzedo*, in payment of a debt owing from *Sykes* and *Yates* to *Alzedo*. In the books of *Sykes* and *Bury* these bills were placed to the debit of *Sykes*. The commission issued in November after the first bill, and before the second and third, had become due (b); and no prior act of bankruptcy was shewn. On the part of the defendants it was objected, that as *Sykes* and *Bury*, if they had remained solvent, could not have

*A.* the partner of *B.* is also in partnership with *C.* *A.* being indebted to the firm of *A.* and *B.* indorses to *A.* and *B.* a bill belonging to the firm of *A.* and *C.* and immediately afterwards indorses it in the names of *A.* and *B.* to *D.*, a creditor of *A.* and *B.*, who receives the amount at maturity. *A.* and *C.* afterwards became bankrupts.

Their assignees cannot maintain trover against *B.*

Nor can such assignees maintain an action against *B.* for money taken by *A.* from the funds of *A.* and *C.* and applied to the use of *A.* and *B.*

(a) Both these cases were argued and decided in Easter term. The insertion of these cases was deferred till this term on account of their connexion with the case of *Jones v. Fort*, ante, 547.

(b) No notice was taken during the course of the argument of the

circumstance of the first bill's having fallen due before the bankruptcy. This would have furnished a good defence to that part of the demand, independently of the principal question, namely, whether the receipt of the money amounted to a conversion.

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maintained any action upon the alleged conversion of these bills, so neither could their assignees; and that the conversion, if any, was complete upon the delivery of the bills to *Alzedo* before the bankruptcy.

A verdict was found for the plaintiffs, but leave was given to the defendants to move to enter a nonsuit. A rule nisi having been obtained accordingly

Sir *J. Scarlett*, and *Joshua Evans* (with whom was *Platt*,) now shewed cause. The conversion is properly laid in the declaration to be after the bankruptcy. The assignees had a right to consider the conversion at the time payment was obtained from the acceptors. Secondly, as to the point made at the trial, that the assignees could maintain no action because the bankrupt could have maintained none, there is no such rule of law. One instance amongst others, in which assignees may sue where the bankrupt himself could not have maintained any action, is where a voluntary preference has been given by the bankrupt; in which case the transaction, though binding as against the bankrupt, may be questioned by the assignees in an action for money had and received, or an action of trover, according to the particular circumstances of the case. So, where the transaction is fraudulent. The question here is, whether the transaction between *Sykes* and *Alzedo* was of such a nature as to bind the partnership of *Sykes* and *Bury*; if not, the assignees may well maintain this action. A partner cannot transfer partnership property to pay his private debt to a creditor who receives it with knowledge that it is partnership property. It is not, however, admitted on the part of the assignees that *Sykes* and *Bury*, had they remained solvent, could not have maintained an action to recover from the defendants the proceeds of these bills. Suppose partnership money applied collusively to the payment of a private debt, it is money had and received by the creditor to the use of the partnership; because the partner who made the payment had no power to dispose of the partnership effects

in satisfaction of his own debt to a party who is cognizant of the circumstances. If *A. B. and C.* are partners, and *D.* knowingly receives from *C.* 100*l.* for a debt due from *C.*, nothing is transferred to *D.* because *C.* had not the *jus disponendi*, the money remaining the money of *A. B. and C.*; and it is no answer to a joint action that *C.* had consented to the alienation; *à fortiori*, where specific goods are sought to be followed in trover. There are cases in which the action has been brought against several partners, upon a contract made with one of them; and it has been held to be a good defence to shew that the person making the contract had no authority to bind his partners. As a partner cannot bind his co-partners by contract in matters unconnected with the partnership, so neither can he bind them by payment. It does not appear that the bankrupts could not have sued; the property was proved to be in the bankrupts; and the case shews the possession of the defendants to have been unlawful. The right of partners to bind one another is governed by the same general rules as other cases of limited authority. An agent binds his principal only when acting within the scope of his authority. Though a partner has more power than an ordinary agent, the transfer of the bills in question was clearly not within that power. If the partnership may repudiate the transfer, the partnership may recover in an action. But the present action is maintainable even though the Court should not be disposed to go that length; for if the property vest in the assignees, a conversion after the bankruptcy will give a right of action. This was a case of gross fraud. A man, who has no money, pays nearly 3000*l.* out of partnership funds in satisfaction of his own debt. If the plaintiffs cannot recover in this action, they have no remedy whatever in a Court of law, which would be a great hardship. It is a plain principle, that gross fraud will vitiate a contract so as to prevent any property from passing under it. If *Sykes and Bury* had sued the defendants, the latter could not have set up the fraudulent transfer by *Sykes* to shew the

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title out of the plaintiffs. Suppose *A.* were to take a bill for 5000*l.* of the joint effects of *A.* and *B.* and make a gift of it to *C.*, such a gift would afford no answer to an action brought in the joint names of *A.* and *B.* In *Bristow v. Eastman* (*a*), which was an action by assignees, it was proposed to read in evidence a receipt in full given by one assignee, from which the other assignee had expressly dissented. Lord *Kenyon* said, that a receipt in full of all demands, when given with a complete knowledge of all the circumstances, is a conclusive bar to the action; and that the party giving it, should not be allowed to rip up the transaction which had been so closed and concluded; but that in order to make such receipt conclusive, it must be given by one having full authority to do so. The law takes notice of fraud as destroying the implied authority of a partner. In *Skaife v. Jackson* (*b*), which was an action by two trustees, a receipt signed by one of them being produced by the defendant, the plaintiffs were allowed to shew that the receipt was fraudulent, and that the money had never been paid. In both the cases cited the non-payment of the money was used merely as a medium to establish the fraud. [*Bayley, J.* You must shew a conversion at a period to which the bankruptcy relates. You cannot rely upon the original parting with the bill, as that took place before the bankruptcy]. The plaintiffs have a right to consider the possession of *Alzedo* as a possession of the defendants through their agent.

*F. Pollock* and *F. Kelly*, *contra*. The question of fraud is improperly introduced into this case. The present defendants do not appear to have ever interfered in the transaction or to have known that the bills were indorsed. The object of *Sykes* may have been to induce *Alzedo* to make further advances by the paying off of old scores; and he probably acted with a view to benefit the new firm. But, however that may be, it is most unreasonable that the as-

(*a*) 1 Esp. N. P. C. 174.

(*b*) 5 D. & R. 290; 3 B. & C. 421.

signees of *Sykes* should sue in respect of a wrongful act done by him only. [*Bayley, J.* It is in law the joint conversion of *Sykes, Young, and Yates*, for which any of the three may be sued. What one partner knows each is considered to know.] Upon the same principle *Bury* must be considered as knowing what *Sykes* knew, and is, therefore, incapacitated from suing. But until an account were taken as between *Sykes* and *Bury*, and also as between *Sykes, Yates* and *Young*, it could not be known with certainty whether *Sykes* had or had not a right to do what he did. Where the same person is a member of two firms no action will lie by the one house against the other. *Bosanquet v. Wray (a)*. The receipt of the amount of the bills when due, is so far from being a conversion, that it would have been a wrongful omission not to get them paid (*b*). Though there was no distinct evidence that *Bury* was aware of the indorsement of these bills at the time, he must be taken to have known it before the bankruptcy, as the bills were entered in the bankrupt's books and became due before the bankruptcy. *Bury* had the means of knowledge; *Yates* had not. *Yates* had no reason to suspect that the bills had been indorsed without the knowledge of *Bury*. The allegation that the conversion took place after the bankruptcy is very material. Had the conversion been laid before the bankruptcy a different line of defence would have been open to the defendants, and they might have pleaded a different plea. If the statute of limitations had been pleaded, the six years must have been computed from some wrongful act done. The transfer of the bills by the indorsement was the conversion here. It is as unreasonable to say that the receipt of the amount at maturity was a conversion, as in the case of a wrongful sale of goods, to fix the act of conversion, not upon the sale itself, but upon the receipt of the price from the purchasers. The case of fraudulent preference stands upon peculiar grounds. It is to be regarded as a contravention of the policy of the bankrupt laws,


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(a) 6 Taunt. 597.

(b) *Vide ante*, 547.



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and a fraud upon the general body of creditors. In *Nixon v. Jenkins* (a) it was held, that where goods came to the possession of the defendant before bankruptcy, a demand and refusal are necessary, and the assignees cannot rely upon the original taking. Here no demand and refusal were shewn; and though it was competent to the assignees to disaffirm the transaction if fraudulent, it was equally competent to them to acquiesce in the transfer. Admitting that *Bury* might treat the indorsement as a nullity, still, in cases where he is obliged to make *Sykes* a co-plaintiff, an action founded upon *Sykes*'s misconduct cannot be sustained; otherwise *Sykes*, if he had survived *Bury*, might have sued alone, and put into his pocket the result of his own fraud. It is clear, that if *Sykes* had been made a joint defendant on this record the action could not have been maintained; and no instance can be shewn where, by omitting a party who might have been joined as a co-defendant, an action has been held maintainable, which, if the party had been joined, could not have been supported. The nature of the wrong done is not altered by such omission. [*Bayley*, J. Suppose in trespass it were pleaded that the plaintiff's wife was a co-trespasser?] In Co. Litt. sect. 376, it is said, "Also if two men do a trespass to another, who releases to one of them by his deed all actions personal, notwithstanding which, he sues an action of trespass against the other, the defendant well may shew that the trespass was done by him and by another, his companion, and that the plaintiff, by his deed, of which he makes profert, released to his companion all actions personal. Judgment of action, &c." Upon which Lord *Coke* says, "Here, by this section, it is to be understood, that when divers do a trespass, the same is joint and several, at the will of him to whom the wrong is done; yet if he release to one of them, all are discharged; because his own deed shall be taken most strongly against himself; but otherwise it is in case of appeal of death &c. As if two men be jointly and severally bound in an obligation, if the obligee release to one of them, both are discharged;

(a) 2 H. Bla. 135.

and seeing the trespassers are parties and privies in wrong, the one shall not plead a release to the other without shewing of it forth (making profert), albeit the deed appertain to the other" (a). Though this is not the case of a release, yet the situation in which *Sykes* stands may be considered as, in effect, a release by *Sykes* to himself (b). *Cocke v. Jennor* (c) is to the same effect. The principle is, that the plaintiff has disabled himself. So a covenant not to sue one of two obligors would operate as a release. [*Bayley, J.* Such a covenant must be pleaded by way of contract, and not as a release. *Littledale, J.* In *Dean v. Newhall* (d) it was held, that if an obligee covenant not to sue one of two joint and several obligors, he may still sue the other; and even if the obligee sue the covenantee, the latter cannot plead that he was released by the obligee.] When a plaintiff declares in tort upon a cause of action, for which he might bring assumpsit, the defendant will not thereby be ousted of his plea in abatement, *Powell v. Layton* (e).

The second action was assumpsit for money had and received in respect of money drawn by *Sykes* out of the funds of *Sykes* and *Bury*, and paid by him to *Yates* in further discharge of the balance due from *Sykes* to *Sykes, Yates, and Young*, as the price of goods transferred from *Sykes, Yates, and Young*, to *Sykes* and *Bury*. On the part of the defendants it was contended, as in the other action, that *Sykes* and *Bury* could not have recovered this money from *Yates* and *Young*, and that the assignees could be in no better situation. A verdict was found for the plaintiffs in this case also, leave being reserved to move to enter a nonsuit.

After the argument upon the case in trover, the case between the same parties in assumpsit was called on.

*Sir J. Scarlett, Platt, and J. Evans*, shewed cause against

(a) Co. Litt. 232, a; 2 Tho. Co. Litt. 111.

(b) As a release in fact to one obligor discharges a co-obligor, so a release in law. *Nedham's case*, 8 Co. Rep. 136.

(c) Hob. 66.

(d) 8 T. R. 168.

(e) 2 N. R. 365. And see *Bretherton v. Wood*, 3 Brod. & Bingham 54; 6 B. Moore, 141; 9 Price, 408.

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the rule for entering a nonsuit. This was the plaintiffs' money. It is objected that *Sykes* ought to have been made a co-defendant; but *Sykes* could not sue or be sued for it. *Sykes* was indebted to the firm. If an account had been taken, *Yates* and *Young* might have sued him for their balance (a). It was the joint debt of the two, and they might have maintained a joint action. From the period of the settlement interest arose; after this *Sykes* by fraud pays over this money in satisfaction of his own debt. In *Graham v. Mulcaster* it was held, that assignees under a joint commission against *A.* and *B.* might recover in the same action debts owing to *A.* and *B.* jointly, and debts due to *A.* separately. With this agree *Stonehouse v. De Silva* and *Smith v. Goddard*. [Lord Tenterden, C.J. If you had wished to sue in the right of *Bury* only, you should have declared as assignees of *Bury*. *Parke, J.* The assignees under a joint commission against *A.* and *B.* may sue for a debt owing to *A.* only, but they cannot recover that debt as assignees of both *A.* and *B.* In *Graham v. Mulcaster* the declaration was framed to meet such a case. Upon the declaration in the present case the assignees must stand upon the right of *Sykes* and *Bury* to sue; and the question is, whether they can sue upon a cause of action for which *Sykes*, *Yates*, and *Young* were liable. This money was applied for the purposes of *Sykes*, *Yates*, and *Young*. [Lord Tenterden, C.J. The money was not paid, as in the former case, to *Alzedo*, but to *Sykes*, *Yates*, and *Young*. *Young* cannot be connected with the transaction except as partner of *Sykes*.)

*F. Kelly*, contra. The question is, whether, if two persons are in partnership, and one of them pays his own debt out of the partnership funds, he may at any subsequent period join with his copartner to recover back the amount.

(a) As to which see *Foster v. Imber*, Holt, N. P. C. 368; *ante*, *Allanson*, 2 T. R. 479; *Moravia v.* iii. 166. *Levy*, ib. 483, n.; *Rackstraw v.*

A man might in this way pay his tailor's bill, and five years afterwards recover back the amount. The cases relied on by the other side have all been where the innocent partner was defendant, and has protected himself by denying the joint promise laid in the declaration. It is stronger here where the payment is made to the three persons, *Sykes*, *Yates*, and *Young*. *Sykes*, *Yates*, and *Young* parted with the goods, and *Sykes* and *Bury* received them. [Lord *Tenterden*, C. J. That may have induced *Bury* to believe that they were bought in as part of *Sykes's* stock.] It is put as if an account were stated and a balance found due; but the evidence shews that no such settlement took place. If this was a partnership transaction, the action should have been against the three; if not, it should have been against each singly.

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*Cur. adv. vult.*

LORD TENTERDEN, C. J., now delivered the judgment of the Court in both actions. After adverting to the facts of the case, his lordship proceeded as follows:—The indorsement of the bills and the payment of the money out of the funds of *Sykes* and *Bury* were frauds committed by *Sykes* upon *Bury*. It does not appear that *Young* was privy to these transactions; but in the view which we have taken of these cases, the privity of *Young* becomes immaterial. We are of opinion, that as *Sykes* and *Bury* could not have sued these defendants, so neither can any action be maintained by their assignees. No instance has been suggested in which a plaintiff has in a Court of law been permitted to rescind his own contract, on the ground that such contract operated as a fraud upon a third person. It was well observed at the bar, that if these transactions had vested in *Sykes* and *Bury* a joint right of action, such right would, upon the death of *Bury*, have survived to *Sykes*, who might thus have avoided his own act by setting up his own misconduct. The remedy of the defrauded partner seems to be in equity. Where a bill of exchange is accepted

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by one of two partners, in the name of the firm, for his own private debt, in collusion with the holder, there is no inconsistency in allowing the defrauded partner to reject the implied authority of the fraudulent partner, and deny the joint liability. That is very different from the case of a party to a fraud attempting to found an action at law upon his own misconduct. It was urged, that nothing passed by the fraudulent transfer, and that the property remained in *Sykes and Bury*; but as against *Sykes* the property did pass, and *Bury* had no remedy at law without making *Sykes* a party to the action. This case has been compared to that of a fraudulent preference, where the assignees of the fraudulent trader may sue, although he himself could have maintained no action. There is no analogy between the two cases. The principle upon which those decisions have proceeded has been, that the voluntary preference is a fraud upon the bankrupt laws, which are framed for the purpose of effecting an equal distribution amongst all the creditors. The early cases upon this subject, *Alderson v. Temple* (a), *Hague v. Rolleston* (b), and *Harman v. Fisher* (c), proceeded upon this principle, and not upon the ground of fraud committed against particular persons.

Rule absolute for entering a nonsuit in each action.

(a) 4 Burr. 2235. (b) *Ibid.* 2174. (c) Cowp. 117; Lofft, 472.

#### DOWBIGGIN, Administratrix, &c. v. HARRISON.

An executor nonsuited, &c. upon a declaration containing a count on an account stated with the plaintiff, as executor, of monies owing to him as executor, is liable for costs in respect of such count.

**ASSUMPSIT** on five counts on promises to the intestate, with a sixth count on a promise to the plaintiff, as administratrix, on an account stated with her of money due to her as administratrix. Plea, *non assumpsit*. The plaintiff having been nonsuited, and the master having refused to tax the defendant's costs, *Campbell* obtained a rule nisi for such taxation, on the authority of *Jones v. Jones* (d).

(d) 1 Bingham, 249; 8 B. Moore, 146.

Sir J. Scarlett, Brougham, and Godson, now shewed cause. At different times various grounds have been assigned for the exemption of executors, when plaintiffs, in payment of costs. The true rule seems to be, that where the action is necessarily brought in the representative capacity, executors are exempt from the payment of costs upon a nonsuit or a verdict against them. The only question, therefore, will be, whether the consideration for the defendant's alleged promise accrued before or after the death of the intestate; and it must be presumed that an account stated with the plaintiff as administratrix, of moneys due to her as administratrix, was in respect of sums due to the intestate in his life-time, and upon which, therefore, the plaintiff could only sue in her representative capacity.

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*Campbell*, contra. The cause of action in the sixth count accrues immediately to the plaintiff; independently, therefore, of *Jones v. Jones*, this case is directly within 23 *Hen.* 8, c. 15 (a). Here he was stopped by the Court.

(a) Which enacts, "that if any person or persons commence or sue in any Court of record, or elsewhere in any other Court, any action, bill, or plaint of trespass, upon the statute of King Richard the Second, made in the fifth year of his reign, for entries into lands and tenements where none entry is given by the law, or any action, bill, or plaint of debt, or covenants upon any especially made to the plaintiff or plaintiffs, or upon any contract supposed to be made between the plaintiff or plaintiffs and any other person or persons, or any action, bill, or plaint of detinue of any goods and chattels whereof the plaintiff or plaintiffs shall suppose that the property belongeth to them, or to any of them, or any action, bill, or plaint of account, in

which the plaintiff or plaintiffs shall suppose the defendant or defendants to be their bailiff or bailiffs, receiver or receivers of their manor, mess, money, or goods to yield account, or any action, bill, or plaint upon the case, or upon any statute for any offence or wrong personal immediately supposed to be done to the plaintiff or plaintiffs, and the plaintiff or plaintiffs in any such kind of action, bill, or plaint, after appearance of the defendant or defendants, be nonsuited, or that any verdict happen to pass by lawful trial against the plaintiff or plaintiffs in any such action, bill, or plaint, that then the defendant or defendants in every such action, bill, or plaint, shall have judgment to recover his costs against every such plaintiff or plaintiffs, and that

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LORD TENTERDEN, C.J.—If we are to consider the promise laid in the sixth count as the contract made between the plaintiff and defendant, it falls directly within the words of the statute; but if we are to look at the consideration as forming part of the contract (*a*), I cannot say that it may not have moved from the plaintiff to the defendant. Suppose goods of the intestate had been sold after his death to the defendant, the defendant might, as here, have accounted with the plaintiff for money due to her as administratrix. So if, after the death of the intestate, money belonging to his estate had been received by the defendant, in both these cases the consideration for the promise would move from the plaintiff to the defendant. Taking it, therefore, either way, it seems to me that the sixth count states a contract made between the plaintiff and defendant.

BAYLEY, J.—The language used by Lord Eldon, C.J., in *Tattersall v. Groote* (*b*), is applicable to the present case. The sixth count states a contract made between the administratrix and the defendant.

PARKE, J.—Looking at the words of the statute instead of stopping at the decided cases, the contract stated in the sixth count was one “made between the plaintiff and another person,” within the statute of *Hen. 8, c. 15*. The defendant is entitled, therefore, to costs upon that count in which the plaintiff sues, not on a promise to the intestate, but upon one alleged to have been made to herself.

#### Rule absolute.

to be assessed and taxed by the discretion of the judge or judges of the Court where any such action, bill, or plaint, shall be commenced, sued, or taken; and also that every defendant in such action, bill, or plaint, shall have such process and execution for the recovery and having of his costs against the plaintiff or plaintiffs, as the same

plaintiff or plaintiffs should or might have had against the defendant or defendants in case that judgment had been given for the part of the said plaintiff or plaintiffs in any such action, bill, or plaint.

(*a*) *Vide Saunders v. Wakefield*, 4 B. & A. 595.

(*b*) 2 B. & P. 131.

PEYTON and others, v. The Governors of St. THOMAS'S  
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**CASE** by reversioners for an injury sustained in consequence of the defendants' having altered, pulled down, and removed, a house, without shoring up, propping up, or duly securing the adjoining house in the possession of the plaintiffs' tenant, in order to prevent the same from being injured by the altering &c. of the defendants' house; so that for want of such shoring up &c. the house in which the plaintiffs were so interested became and was, by and through the altering &c. of the defendants' house, greatly weakened, damaged and injured, and in part fell down. The second count ascribed the injury to the negligence and unskilful and improper conduct of the defendants, by their servants, in and about the altering &c. of the defendants' house. Other counts charged the defendants with negligence in the pulling down of the party-wall between the houses. Plea, not guilty. At the trial before Lord *Tenterden*, C. J. at the adjourned sittings after Trinity term, 1828 (a), the following facts appeared:—The plaintiffs were owners of a house in Cheapside, in the occupation of a tenant, adjoining a house of the defendants on the eastern side, and on the western side abutting on Honey Lane. The defendants' house being out of repair was supported by struts resting against houses on the opposite side of the lane. The defendants agreed with *Lees* to grant him a building lease. Under this agreement *Lees* pulled down the defendants' house and removed the struts; in consequence of which, the plaintiffs' house separated from the house next adjoining on the eastward, and was materially injured. The defendants did not shore up the plaintiffs' house either externally or internally (b).

Upon a declaration for negligence in pulling down a house adjoining the plaintiffs' house without shoring up the latter, whereby it fell, the plaintiff cannot recover without evidence from which a grant of a right to the support of the adjoining house can be inferred.


*Qu.* Whether such a right ought not to have been stated.

Nor upon such a declaration can the plaintiff insist that the defendant ought to have given notice of his intention to pull down.

(a) Counsel for the plaintiffs, *Tindal*, S. G., *Gurney*, *Brodrick*, and *Dodd*; for the defendants, Sir J. *Scarlett*, *Campbell*, and C. *Cresswell*.

(b) A question arose at the trial whether a letter written by one *Robinson*, the defendants' surveyor, to the plaintiffs respecting the pulling down of the defendants' house,



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The plaintiffs put up some internal supports; and it appeared that if the plaintiffs' house had been properly shored up on the inside, the injury would not have happened. The learned judge was of opinion that, upon this state of the facts and pleadings, the injury was attributable to the negligence of the plaintiffs, in omitting to shore up their own house, and directed a nonsuit. In Michaelmas term last a rule nisi for a new trial was obtained by *Tindal*, S. G. on two grounds; first, that the defendants were answerable for the injury arising from the removal of their own house; and secondly, that supposing the defendants were not bound to shore up the plaintiffs' house, it was incumbent on them to give the plaintiffs, or their tenant, reasonable notice of their intention to pull down their own; and *Jones v. Bird* (a) was relied on.


*Scarlett*, A. G., *Campbell* and *C. Cresswell*, now shewed cause. It was supposed at the trial that the letter from *Robinson* to *Dwarris* threw on the plaintiffs the obligation of repairing; but the acts of *Robinson* would not bind the defendants without proof of authority. Upon the clear ground taken by the learned judge the nonsuit will be supported. The plaintiffs' house fell by reason of the supports being withdrawn. The declaration contains no counts charging the defendants with pulling down their house without giving notice to the plaintiffs to shore up theirs; unless the mere pulling down the house be a wrongful act, the plaintiffs cannot recover upon this declaration. The owner of a house has a right to pull it down without shoring up his neighbour's; *Com. Dig. Action upon the Case*, (A.) and (B. 3) (B. 4); *Rex v. Commissioners of Sewers* for

was admissible in evidence for the plaintiffs. It was objected that *Robinson* should have been called. The objection was overruled, on the ground that as *Robinson* had the management of the buildings of the hospital, including the house

in question, it must be presumed that he wrote as their surveyor and by their express authority. As the plaintiffs, notwithstanding this evidence, were nonsuited, the point did not come before the Court.

(a) *Ante*, i. 497; 5 B. & A. 837.

*the Levels of Pagham (a)*. In that case, this Court adopts the principle, that in order to maintain the action both a wrong and an injury must concur. The plaintiffs relied upon the principle of the civil law, "*sic utere tuo ut alienum non lædas*," but upon looking into the civil law it will appear that a party is not liable for an injury occasioned without his default; *Domat*, C. L. book ii. tit. 8, sec. 3, art. 9; where he instances the case of a man's protecting his own land. So *Vattel*, book ii. chap. 5. (b) In *Virtue v. Bird (c)*, the plaintiffs might have shored up their own house. In *Jones v. Bird (d)*, the only case which was cited when this rule was moved for, the commissioners were acting for the plaintiff as well as others, and had power to enter any premises and shore them up, and to raise money to pay the expense; and it was expressly found that they had been guilty of negligence. The plaintiff had built upon his own freehold, and the defendants' act, in removing the support from under the plaintiffs' chimneys, without providing another, was wrongful. To make this case like that of *Jones v. Bird*, it must be shewn that the plaintiffs had a right to have their house supported by that of the defendants. If a grant of such an easement could be presumed, it would be to endure only whilst the house was standing; otherwise, if the house had fallen down, the defendants would have been under an obligation to rebuild it for the plaintiffs' security. The party enjoying the easement is bound to repair. *Bullard v. Harrison (e)*, *Taylor v. Whitehead (f)*, *Pomfret v. Ricroft (g)*. Supposing, therefore, the easement to exist, the defendants would not have been liable if their house had fallen down and that of the plaintiffs followed. [*Bayley*, J. Removing is very different from not repairing. Lord *Tenterden*, C. J. There is a difference between an act done and an omission.] The house being in danger of falling, it was the duty of the defendants to pull it down.

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(a) *Ante*, ii. 468.

(e) 4 M. &amp; S. 387.


(b) *Quere*.

(f) Dougl. 745.

(c) 2 Lev. 196.

(g) 1 Saund. 321.

(d) *Ante*, i. 497; 5 B. & A. 837.

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*Brodrick and Dodd*, contra. It is submitted, generally, that where there are adjoining houses, a person taking down one of them is bound to use reasonable means of preventing damage to the other at his own expense. If the plaintiffs fail in establishing that proposition, and it is considered that the party has a right to throw that burthen upon his neighbour, still he is bound to give notice of his intention. It cannot be contended that the owner of a house standing between two others may pull it down without regard to the consequences to the adjoining houses. The case put of a house falling down does not apply. A tenant at will is not liable to an action of waste, if the premises are burnt down, though it would be otherwise if they were pulled down. In the *Abbot of Stratford's* case (a), pulling down a wall for the purpose of enlarging a parlour, where the parlour was enlarged before action brought, was held not to be waste: that was questioned in an anonymous case in 11 *Modern* (b). The law upon this subject is laid down in an old case, *Edwards v. Halinder* (c), where it was held, that the occupier of a warehouse, in which he had put so great a weight that the floor gave way, was liable for an injury thereby occasioned to the occupier of a cellar under it; but it was said that it would have been otherwise if the floor had fallen through decay. This case establishes the distinction between misfeasance and nonfeasance. An action lay at the common law for an injury occasioned by a fire extending from an adjoining house. In *Jones v. Bird* (d), the stack of chimneys did not belong to the plaintiff, and no part of the foundation of the plaintiff's house was undermined by the commissioners; but it was held that they were bound to use all skilful means to prevent an injury, and that they were bound to shore up. [Lord Tenterden, C.J. As to the merits, I left it generally to the jury to say whether there was a want of due care and diligence on the part of the defendants. One question arising at the trial

(a) *Keilwey*, 36.

(b) 11 *Mod.* 7.

(c) *Popham*, 46; 2 *Leon.* 93.

(d) *Ante*, i. 497; 5 *B. & A.* 837.

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was as to the effect which shoring up would have produced; and I stated, that the commissioners of sewers and their agents, when repairing sewers in the neighbourhood of houses, were bound to take all proper precaution for their security; and that one question for the jury to consider was, whether shoring up was a proper precaution, and whether it had been omitted; I also told them, that even if they were of opinion that the stack of chimneys could not, by any shoring up whatsoever, have been prevented from falling, still that it was the duty of the defendants to give specific notice of the danger to the owner, and that if they did not do so, they were responsible.] In *Turbervile v. Stamp* (a) the defendant was held liable for negligently keeping a fire in his field, whereby it extended to the plaintiff's field and consumed his corn; and the Court said, every man must use his own, so as not to hurt another; but if a sudden storm had arisen which the defendant could not stop, it was a matter of evidence, and he should have shewn it. Here the defendants were at all events bound to give reasonable and distinct notice. [Lord Tenterden, C. J. Will your declaration and your evidence meet this case?] Not having given the notice, they were bound to prop up the house; it lay upon the defendants to shew that they had given notice, and were, therefore, not liable to prop up the house. [Lord Tenterden, C. J. The point of want of notice was not insisted on at the trial.] The want of notice was urged on the motion for a new trial. In *Slingsby v. Barnard* (b), it is said, that if a man dig a pit in his land so near to my house that my house falls into the pit, an action on the case lies; *Roberts v. Read* (c). These cases are founded upon the principle, that a party exercising acts upon his own land, is bound to take care that no injury thereby accrue to others. If a party be bound to repair a fence, he is liable to the injury accruing to the occupier of the adjoining land through the defect of such fence,

(a) 1 Salk. 13.

(b) 1 Roll. Rep. 430.

(c) 16 East, 215.

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*Rooth v. Wilson* (a). The case of *Rex v. Pagham* (b) is very distinguishable, that was a case *sui generis*; here there was no common enemy to contend with. The French law derived from the civil law is much more full and explicit with respect to easements, or, as they are called, servitudes, than our own. It is laid down by *Pardessus*, title *Servitude* (c), that the obligation of using precaution always falls upon the party exercising the right. This position is supported by references to the *Digest* (d). The allegation in the declaration, that the defendants conducted themselves negligently in pulling down the house, reaches the grievance of pulling down without notice.

At a subsequent day the judgment of the Court was delivered by

Lord TENTERDEN, C.J., who, after stating the pleadings, proceeded thus:—The declaration does not allege as a fact, or raise an inference, that the plaintiffs were entitled to have their house supported by that of the defendants. The first count assumes that it was the duty of the defendants to support the plaintiffs' house when they took down their own: the second count is more general, but it does not charge want of notice as the injury complained of; we are, therefore, not called upon to pronounce any opinion whether the defendants were bound to give such notice beforehand. At the trial I was of opinion that it was the duty of the plaintiffs to support their own house by shores within, and upon that ground I directed a nonsuit. The case has been since very well argued on both sides; we have considered it, and, adverting to the facts proved, and to the absence of any evidence from which a grant of a right to support from the defendants' house might be inferred, and to the form of the declaration, we are of opinion that the nonsuit was right.

Rule discharged.

(a) 1 B. & A. 59.

(b) *Ante*, ii. 468.

(c) 248, 260.

(d) D. 8, 2, per totum titulum;

D. 10, 1, 13. Si tamen tam altè fodiam in meo ut paries tuus stare non possit, *damni infecti stipulatio* committetur, D. 39, 2, 24, 12.

The KING v. The Inhabitants of BOURTON-UPON-  
DUNSMORE (a).

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UPON appeal against an order of two justices for the removal of *Henry Webb*, his wife, and their five children, from the parish of Stretton-upon-Dunsmore to the parish of Bourton-upon-Dunsmore, both in the county of Warwick, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The appellants admitted a *prima facie* settlement by birth in their parish, and then proved that the pauper had served more than forty days in a third parish, under an indenture of apprenticeship bearing date 26th April, 1813.

This indenture, the respondents contended, was void upon the following evidence.

The mother of the pauper, who was an illegitimate child, was directed by her husband, who was not the father of the child, to give a premium of 10*l.*, and no more. The master required 20*l.* This amount the mother refused to give, but came to a private understanding with the master that he should receive something in addition to the 10*l.*, but what particular sum did not appear. It was also agreed that the sum of 10*l.* only should be inserted in the indenture, which was accordingly done. The stepfather paid the premium of 10*l.*, and the mother paid the further sum of two guineas and a half. Neither the apprentice nor the stepfather were privy to the understanding above mentioned, and never knew that a greater sum than 10*l.* had been paid; but the master was not aware that the agreement by the mother to give more than the 10*l.* was without the authority or privy of her husband. The indenture bore the proper stamp for any sum not exceeding 30*l.*

The question for the opinion of the Court is whether or not the pauper was settled in the appellant parish.

An undertaking by the mother of an apprentice, without the knowledge of her husband, to pay the master a sum of money beyond the premium inserted in the indenture and paid by the husband at the time of its execution, (the stamp on the indenture being sufficient for both sums,) does not make the indenture void under 8 *Ann.*, c. 9, s. 39: the undertaking being void, and no fraud being practised on the revenue.

(a) This and the following cases were decided after the term, by the three puisne Judges sitting in the Bail Court, as on former occasions.

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*White*, in support of the order of sessions. The question in this case is, whether the consideration paid to the master is truly inserted in the indenture, so as to satisfy the requisites of the statute 8 *Anne*, c. 9, s. 35. That section enacts, that the full sum of money received (i. e. by the master) or in any wise, directly or indirectly, given, paid, agreed, or contracted for during the term, with or in relation to any apprentice, shall be truly inserted in the indenture, which shall bear date upon the day of the execution of the same. It is submitted that the requisites of that section have not been complied with in this case, and consequently that the indenture is void by s. 39 of the same statute, which declares, that every indenture, wherein shall not be truly inserted the full sum received, or in any wise, directly or indirectly, given, paid, secured, or contracted for, with or in relation to any apprentice, shall be void, and not available to any purpose whatsoever. It will be contended on the other side, that the additional sum given by the mother having been paid after the execution of the indenture, could not in fact, and need not by law, be inserted in the indenture; and that the agreement to give that additional sum being made by the mother, without the authority or privity of her husband, was void, and therefore could not affect the indenture. Both these propositions may be true, and yet furnish no answer to the objection now relied on. The statute requires that the whole sum received, given, paid, agreed, or contracted for, shall be truly inserted in the indenture: here a sum was agreed for, paid, and received, which was not inserted in the indenture. The 32d section requires the duty payable in respect of the premium to be paid by the master; and the 35th section imposes a penalty upon every master receiving any premium not truly inserted in the indenture. The onus, therefore, of ascertaining that every thing is done strictly according to law is laid upon the master by the statute; so that the ignorance of the master, in the present case, of the wife's paying the additional premium without the authority of her husband, can-

not vary the question as to the legality of the transaction. Again, by the 43d section no indenture can be given in evidence by either of the parties, unless such party first makes oath that the sum inserted in the indenture was really all that was paid. In this case the master could not have taken that oath without being guilty of perjury, and the indenture could not have been made evidence on his behalf, which is another criterion to shew that the indenture itself was irregular and void. The argument that the additional sum could not in this case be inserted at the time of executing the indenture, because it was not paid till afterwards, would, if admitted at all, go to defeat the object of the legislature altogether; because upon the same principle the entire premium might be omitted as well as a part, and constant frauds would be practised upon the revenue. [Bayley, J. But here no fraud was practised upon the revenue, nor could be. The sum *paid* at the time of executing the indenture was 10*l.*, and no more. There was a *promise* on the part of the wife to pay more; but was not that promise void? Could not the husband have recovered back the additional sum paid by the wife, in an action for money had and received against the master? The object of the legislature was to prevent fraud upon the revenue. Here no fraud could be practised upon the revenue, because the stamp upon the indenture was sufficient for any premium under 30*l.*, and therefore much more than sufficient both for the 10*l.* inserted in the indenture, and the two guineas and a half afterwards paid beyond.] It must be admitted that no fraud upon the revenue was actually practised; and if the Court consider the case as depending upon that fact, the argument against the validity of the indenture cannot be carried further.

BAYLEY, J.—It seems to me that the object of the legislature in requiring that the whole sum paid, or agreed to be paid, to the master, should be inserted in the indenture at the time of its execution, was to protect the revenue,

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which might otherwise be defrauded, by the party's paying at that time a small sum upon which a small duty only would be payable, and afterwards paying a larger sum upon which a larger duty would be payable, and which would thus be lost to the revenue. Nothing that was done in the present case could have any tendency to defeat that object. The sum agreed for and paid by the husband, at the time of executing the indenture, was 10*l.*, and that sum is truly inserted in the indenture. There was an agreement by the wife to pay a further sum, and she did actually pay a further sum. But neither the agreement nor the payment was binding upon the husband, because both were made without his privity or authority. Then, as I have already observed, there could be no fraud upon the revenue, because both the sums paid amounted to only 12*l.* 12*s.* 6*d.*, and the indenture bore a stamp adequate to any sum under 30*l.* For these reasons I am of opinion that this indenture is a valid instrument, and that a settlement was acquired by due service under it. The order of sessions, therefore, must be quashed.

The other Judges concurred.

Order of Sessions quashed (a).

(a) *Waddington* was to have argued in support of the indenture.

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BEECHEY v. SIDES.

The owner of property arresting a person, in the bonâ fide belief that he was acting in pursuance of 7 & 8 Geo. 4, c. 30, s. 28, is entitled to the notice of action required by s. 41 of that statute.

**TRESPASS**, for an assault and false imprisonment. Plea, not guilty; and issue thereon. At the trial before *Parke, J.* at the spring assizes for the county of Oxford, in 1829, the case was this:—In December, 1828, *Weller* was tenant to the defendant of a farm and two meadows, in one of which there were some willow trees, which *Weller*, in pursuance,

as he alleged, of the custom of the country, claimed the right to lop. *Weller* accordingly sold the loppings to *Harris*, who employed the plaintiff to lop the trees. Upon the plaintiff's beginning to lop the trees, the defendant gave him notice to desist, and upon his nevertheless persevering, the defendant, considering the plaintiff as a person committing an offence against the statute 7 & 8 *Geo.* 4, c. 30 (a), procured a constable, who, by the defendant's direction, took the plaintiff into custody. He was taken to the town-clerk's office in Oxford, where he was set at liberty upon his own undertaking to appear the next day before a magistrate. He did so appear, and was then discharged. It was objected on the part of the defendant that the action could not be supported, for want of the notice of action required by the forty-first section of the statute (b), the action being brought against him "for a thing done in pursuance of the act." The learned Judge was inclined to think the objection fatal, but refused to nonsuit the plaintiff, reserving, however, liberty to the defendant to move to enter a nonsuit, if a verdict should be found against him. The jury having found a verdict for the plaintiff, with twenty

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(a) Entitled, "An act for consolidating and amending the laws relating to malicious injuries to property."

(b) Which enacts, that in "all actions commenced against any person for any thing done in pursuance of this act, notice in writing of such action, and of the cause thereof, shall be given to the defendant, one calendar month at least (*vide ante*, 301,) before the commencement of the action."

By s. 30, persons destroying or damaging trees, shrubs, &c. where-soever growing, and of any value above one shilling, are punishable on summary conviction: by s. 24,

persons committing damage to any property, in any case not previously provided for, may be compelled by a justice of the peace to pay compensation, not exceeding five pounds: and by s. 28, "any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace-officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

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pounds damages, a rule nisi was obtained for entering a nonsuit upon the objection taken at the trial.

*W. E. Taunton* now shewed cause. The action is maintainable, and the rule must be discharged. The defendant clearly was not entitled to notice as a person acting in aid of the constable, for he was the principal in the transaction, and the constable merely acted under his directions in arresting the person of the plaintiff: *Staight v. Gee (a)*, *M'Cloughan v. Clayton (b)*. The only question, therefore, is, whether the defendant, being the owner of the property injured, and having taken the plaintiff into custody, was in that character entitled to notice of action. Now he clearly was not, for his apprehension of the plaintiff was not "a thing done in pursuance of the act;" on the contrary, the defendant was a wrong-doer. The policy of the statute was to protect officers of the law in the execution of their public duties. *Edge v. Parker (c)* is in point. The bankrupt act, 6 Geo. 4, c. 16, s. 44, enacts, that every action brought against any person for any thing done in pursuance of that act, shall be commenced within three calendar months next after the fact committed; and it was decided in that case by this Court, that an entry by assignees into the house of a third person to take the goods of the bankrupt, was not a thing done in pursuance of that act, so as to render it necessary that an action brought against the assignees should be commenced within three calendar months. The Court of Common Pleas had previously come to a similar decision in the case of *Carruthers v. Payne (d)*. Upon the principle of these cases the present defendant, who claimed to be the owner of the property injured, and in that character imprisoned the plaintiff, is not entitled to the protection of this statute.

(a) *Ante*, iii. N. P. C. 445.

(b) *Holt's N. P. C.* 478.

(c) *Ante*, iii. 365; 8 B. & C. 697.

(d) 5 Bingham 270; 2 Moore & P.

429.

*Talfourd*, *contra*, was stopped by the Court.

LORD TENTERDEN, C. J.—I think this rule for entering a nonsuit must be made absolute. We have nothing to do with the policy of the law; our duty is to give a construction to this clause in this act of parliament consistent with that which has been given to similar clauses in other acts of parliament. It has been uniformly held, that where a party *bonâ fide* believes or supposes that he is acting in pursuance of an act of parliament, he is within the protection of such a clause. The present defendant *bonâ fide*, though erroneously, supposed that he was acting in pursuance of the statute 7 & 8 *Geo.* 4, c. 30, when he caused the plaintiff to be taken into custody. This case, therefore, is perfectly distinguishable from that of *Edge v. Parker*. There was no pretence there for saying that the statute 6 *Geo.* 4, c. 16, gave the assignee of a bankrupt any right to enter the house of a third person for the purpose of seizing the property of the bankrupt. The assignee entered the house as owner of the goods, and not in pursuance of the statute.

BAYLEY, J.—Where the facts are such that a party may be considered as having any fair colour for supposing that he is warranted by the act of parliament in doing that which is made the subject of an action against him, he is entitled to notice. The protection is extended to private persons as well as peace-officers, if they have acted *bonâ fide*.

The other Judges concurred.

Rule absolute (a).

(a) See *Cooke v. Leonard*, 9 D. & R. 339; 6 B. & C. 351.

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## SPARGO v. HUGH BROWN.

In trover by *A.* against *B.* for goods distrained by *B.*, *A.* having shewn a *prima facie* tenancy under *C.* by payment of rent to *C.*, it is not competent to *B.* to produce the written acknowledgment of *C.* that he received such rent as agent for *B.*, no connexion between *B.* & *C.* being shewn *aliunde*, and it not appearing at what period the acknowledgment was made.

Where a declaration contains a count for an excessive distress, and a count in trover, it is competent to the plaintiff at the trial to abandon the special count, and, denying the tenancy, to recover under the count in trover without giving any previous intimation that he will take that course.

**CASE.** The declaration contained counts charging the defendant with distraining for more rent than was due, and with an excessive distress, and also a count in trover. At the trial before *Park, J.* at the Bodmin assizes, 1828, the plaintiff's counsel abandoned the special counts, and denying the tenancy altogether, relied upon the count in trover. It was objected on the part of the defendant that he came prepared to try a question where the tenancy was admitted, and that it was not competent to the plaintiff to change his ground, and so take the defendant by surprise. This objection being overruled, the plaintiff proved that he had taken the premises originally from *John Brown*, to whom the rent had been regularly paid for several years. To shew that *John Brown* had received these rents as agent for the defendant, the latter proposed to give in evidence accounts rendered to him by *John Brown*, acknowledging that these rents had been received by him on account of the defendant. *John Brown* was alive, but was not called as a witness. The learned judge rejected these accounts as inadmissible; and a verdict was found for the plaintiff. In Michaelmas term last, *Halcomb* obtained a rule nisi for a new trial, on the ground of this evidence being rejected, but the Court refused to grant the rule on the ground of surprise, saying, that each count was in the nature of a separate action, which the defendant was bound to meet.

*Selwyn* and *Follett* shewed *acuse*. An admission without oath is admissible only when such admission is shewn to have been made by parties or privies, as where the person making the admission is a plaintiff on the record, though he may happen to have no interest in the subject-matter of the action, *Bauerman v. Radenius* (a); or where not

(a) 7 T. R. 663 and 2 Esp. N. P. C. 653; and see *Lane v. Chandler*, 3 Smith 77—81.

being in form a party to the record, he is a party in interest, as a cestui que trust, *Hanson v. Parker* (a); or as a parishioner, *Rex v. Hardwick* (b); or by reason of having indemnified a party on the record, *Dowden v. Fowle* (c). Here *John Brown* is not shewn *aliunde* to have any connexion with the party to whom he is supposed to have accounted. It is not sufficient that the supposed admission is against the interest of the person making it when such person is living and can be called as a witness, *Borough v. White* (d).

*Hulcomb*, contra. If *John Brown* had been in actual possession of the premises, what he might have said in derogation of his own title would have been receivable in evidence. The receipt of the rents and profits is here equivalent to possession. If the defendant had called *John Brown* he could not have compelled him to give evidence. In *Harrison v. Vallance* (e), which was trover for a deed detained by the defendant at the request of one *Reeve*, and in which detainer *Reeve* was substantially interested, it was held that declarations of *Reeve* were admissible in evidence for the plaintiff. [*Bayley*, J. In that case there was evidence under the defendant's hand that he held the deed for the benefit of *Reeve*.] So here, the plaintiff accredited *John Brown* by putting in his receipts. In *Fenn*, dem. *Pewtress*, v. *Granger* (f), it was held that one of two several lessors in ejectment could not be required to impeach the title of his co-lessor, though it appeared he had no interest in the premises. [*Parke*, J. There is no pretence to say that this action was brought for the benefit of *John Brown*. *Bayley*, J. Suppose that on the day before the trial, the

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(a) 1 Wilson, 257.

(b) 11 East, 578.

(c) 4 Campb. 38; and see *Kemp-land v. Mucauley*, Peake, N. P. C. 65; *Dyke v. Aldridge*, 7 T. R. 665; and 11 East, 584, n.; *Young v. Smith*, 6 Esp. N. P. C. 121.

(d) 6 D. & R. 379; 4 B. & C. 325.

(e) 1 Bingh. 45, more fully reported 7 B. Moore, 304.

(f) 3 Campb. 177; and see *Norden v. Williamson*, 1 Taunt. 378; *Rex v. Whitley*, 1 M. & S. 636.

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defendant had written to *John Brown*, asking him whether he claimed the property, and *John Brown* had answered no, it could not have been contended that the answer would have been admissible in evidence. The case would have stood differently if you had proved that the defendant had accounted with *John Brown* from time to time.] In *Upton v. Curtis(a)*, which was replevin by an under-tenant against the lord paramount, who distrained, as bailiff of the mesne landlord, for the amount of rent due from the under-tenant to the mesne, it was held that the mesne was not a competent witness to prove the amount of rent due. [*Bayley, J.* There the party was called to support a distress which would pay his rent. *Parke, J.* You want the foundation, namely, that *John Brown* is the real defendant. A paper which may have been manufactured the day before is not evidence.]

**BAYLEY, J.**—The general rule is to proceed upon testimony given on oath. Declarations are admitted where the person who makes them is identified with the party on the record; or where the cause is substantially his own. If it had appeared that *John Brown* had accounted from time to time with the defendant, such accounts would have been evidence that he was the defendant's agent, but it was not shewn when the paper offered in evidence came into the defendant's hands, and there was no evidence *aliunde*. The account was not part of an act done.

**LITLEDALE, J.**—Declarations not on oath are in general inadmissible in evidence. Where the party is alive he ought to be called. The exception to this rule is where the declaration is shewn to have been made by a person identified with the party on the record. The person for whose benefit an action is brought or defended stands in

(a) 1 Bingh. 210. Qy. Whether the marginal note in this case is not adapted to the cognizance stated to have been abandoned; and see 8 B. Moore, 52, S. C.

the situation of a real party to the action. Here it does not appear that the action was brought for the benefit of *John Brown*.

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PARKE, J.—This account may have been manufactured for the very purpose of being given in evidence at this trial. If it had been shewn to have existed at a former period, it might, perhaps, have been admissible in evidence.

Rule discharged.

BLACKET v. BLIZARD, Knt., and SAWYER.

**PROHIBITION.** The libel stated, inter alia, the erection of the district church of St. Matthew, Brixton, under the provisions of 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, the assignment to the new church of a portion of the parish of St. Mary, Lambeth, and the appointment of the rector of St. Mary, Lambeth, the curate of the district church, and 26 substantial inhabitants of the said district and their successors, to be a select vestry for the care and management of the concerns of the said church of St. Matthew, Brixton, and all matters and things relating thereto, and in all respects as fully and effectually, and with all such powers and authorities as the commissioners appointed by the said acts, with the advice of the Bishop of Winchester, were authorised and empowered to appoint a select vestry for the care and management of the churches built under the authority of the said acts, and that such select vestry, after being so appointed, had managed, and they and their successors then did manage, the concerns of the said district church and all matters and things relating thereto; that on the 18th April, 1827, at a meeting of a select vestry held in &c. pursuant to notice, the rector of St. Mary, Lambeth, appointed Sir *William Blizard* to be the minis-

To constitute a valid assembly of a select vestry appointed under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, a majority of the whole number appointed should be present.



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ter's warden, and the select vestry, then present, elected and chose the defendant *Sawyer* to be the district warden, of the said district church; that the defendants were duly sworn in and continued to be such churchwardens; that certain sums of money being required to defray the necessary expenses relating to the said district church, a meeting of the said select vestry of St. Matthew, Brixton, was on or about the 2d day of August, 1827, held in the vestry room belonging to the said district church, pursuant to due notice previously given for that purpose; and at such meeting the said select vestry had agreed and resolved, with the concurrence of the churchwardens, that a rate for and towards the repairs of the said district church should be made, and that every inhabitant and occupier of lands, messuages, tenements and premises ratable within the said district should be taxed and pay after the rate of 3*d.* in the pound; and that after the said select vestry had resolved a rate was accordingly duly made by them, and that on or about the 11th day of the said month of August the said rate was duly allowed and confirmed by the Rev. *William Mann*, clerk, surrogate of the worshipful *John Poulter*, bachelor of law, commissary of the said bishop in and for the parts of Surrey; that the plaintiff was rated or assessed at the sum of 12*s.* 6*d.*, being at the rate of 3*d.* in the pound upon a yearly rent or value of 50*l.*; that the plaintiff before and at the time of making the said rate or assessment was and still is a parishioner and inhabitant of the said district, and the occupier of a house &c. within the same of the annual value of at least 50*l.*, and was by the said rate and assessment duly and justly rated and assessed at the sum of 12*s.* 6*d.*; that the defendants, at the time of making the said rate or assessment, and at the commencement of that suit, were churchwardens for the said district, and that the said sum of 12*s.* 6*d.* so rated &c. was then due to them as such churchwardens; that the plaintiff had been several times requested, and had refused, to pay; that defendants caused plaintiff to be summoned before two justices under 53 *Geo.*

3, c. 127 (a); that on 31st January, 1828, plaintiff appeared before the justices, attended by *R. W.* his attorney, who objected to the validity of the rate of assessment, and delivered the justices a notice in writing, signed by the plaintiff, stating that he objected to the validity of the same, whereupon the justices declared that they had no further jurisdiction, and that the validity of such rate or assessment must be determined or settled in the Ecclesiastical Court; that no objection was made by the plaintiff or the said *R. W.* to the amount of the said rate or the rent at which the plaintiff was rated or assessed. The declaration then went on to state, that the said rate was made and subscribed at the meeting of the said select vestry, at which meeting a majority of the select vestry-men was not present, but only the churchwardens and five others of the select vestry, and was made for and towards the repairs of the said district church as it was manifestly shewn to the said Ecclesiastical Court, and appears by the rate exhibited to the said Court by the said defendants in support of their said allegation; and although all the before mentioned matters and things manifestly appeared and were proved to the said Ecclesiastical Court, and the said plaintiff thereupon alleged and shewed to the said spiritual judge that the said select vestry had no right by the said acts of parliament or either of them or otherwise to make any such rate for the repairs of the said district church; and that the true intent and meaning and interpretation of any act or acts of parliament ought to be

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(a) Which, after reciting "that it is more expedient that the church rates should be more easily and speedily recovered, enacts, that the same may be so done by summons and warrant by two justices with appeal to the sessions, provided that nothing herein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of the

church rate or chapel rate, or from proceeding to enforce the payment of any such rate if exceeding 10*l.*, likewise if the validity of such rate or the liability of the person be disputed, and notice thereof given the justices, in which case they shall forbear judgment, and the persons demanding same may then proceed to recovery of their demand according to due course of law as theretofore used and accustomed."

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tried, discussed and determined at common law in the King's Courts of Record, and not in the Ecclesiastical Court or by any ecclesiastical judge or ecclesiastical jurisdiction whatsoever; that the said rate was not made and subscribed by a sufficient number of the select vestry, and, therefore, prayed the said spiritual judge to reject the said libel, and to dismiss the said suit; nevertheless, the said spiritual judge to reject the said libel or to dismiss the said suit hath wholly refused, but, on the contrary, hath admitted the same, and is daily contriving to condemn the said plaintiff by a definitive sentence or decree of the said Ecclesiastical Court, contrary &c.; and although his majesty's writ of prohibition was on &c. at &c. directed and delivered to the said spiritual judge; and although defendants then and there had notice thereof, nevertheless the said defendants, after the prohibition &c. General demurrer, and joinder.

*Comyn*, in support of the demurrer. First, a select vestry appointed under 59 *Geo. 3*, c. 134, s. 30, has authority to make a rate for the repairs of the church without consulting the parish at large. Secondly, the rate is good, although a majority of the persons forming the select vestry did not attend. [The Court said that he might confine himself to the second point.] The rule laid down in *Rex v. Belringer* (a), and *Rex v. Morris* (b), requiring the presence of a majority of each definite integral part, is founded upon the apparent intention; and this case must be governed by the intention of the grantor to be collected from the whole instrument. Here there is nothing to indicate that the legislature required the presence of an absolute majority of the trustees. The nature of the trusts confided in them might render it necessary for them to act at a time when the attendance of an absolute majority of the trustees could not be readily procured.

*Joshua Evans*, contra. In *Grindley v. Barber* (c), and

(a) 4 T. R. 810.

(b) 4 East, 17.

(c) 1 Bos. & Pull. 229.

*Cooke v. Loveland* (a), it was held, that the duty imposed upon the body at large is, that a majority of the entire body shall meet. Here he was stopped by the Court.

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BAYLEY, J.—I take it to be a general rule of law, that where a limited number of persons are to perform a public duty, there must be a majority of the whole body assembled, and that a majority of the persons assembled at such a meeting may act. This was the principle of the decision in *Cooke v. Loveland* (a), which has been cited, and in *Rex v. Bellringer* (b), *Rex v. Miller* (c), and *Rex v. Bowen* (d); so also in *Rex v. Beeston* (e), and *Withnell v. Gartham* (f), though the last two are not cases of corporations. So if a commission be issued to 20 justices without a quorum clause, a majority must meet, *Regina v. Ipswich* (g). In the case now before the Court, the act to be done requires the exercise of judgment and discretion, and unless a majority of the entire body were bound to meet, its functions might devolve upon one or two individuals. The public safety requires the security which is afforded by the presence of a majority of the persons constituting the select body. The 60th section of 58 Geo. 3, c. 45, and the 25th section of 59 Geo. 3, c. 134, have been cited, but I think that they do not control or alter the general law. Upon the whole, I think that the rate is invalid by reason of its having been made by a smaller number than the majority, namely, by seven, when the body consisted of 26.

LITLEDALE, J.—I am of the same opinion. The distinction is between an indefinite and a definite body. In the case of a select vestry, which is a definite body clothed with a special public trust, I think it most important that a

(a) 2 Bos. & Pul. 31.

(b) 4 T. R. 810.

(c) 6 T. R. 268.

(d) 2 D. & R. 761; 1 B. & C.

492; and see *ante*, i. 541, n.

(e) 3 T. R. 592.

(f) 6 T. R. 388.

(g) Holt's Rep. 443, S. C. not

S. P. 2 Ld. Raym. 1233, 1283;

2 Salk. 434; 11 Mod. 67.

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majority of the persons in whom such trust is reposed should attend. The object of the legislature is that a certain number of the inhabitants should assemble to give their judgment and use their discretion in making the rate.

PARKE, J.—I am of the same opinion. And I see no difference between the rule of construction as to a charter and as to an act of parliament; and it having been a rule in cases of construction of charters that a majority of a definite body must assemble, I do not think that the clause in the acts referred to by the plaintiff affects the general rule. If that rule were not to apply to this body, it might be permitted to die away, or to be reduced to a very small number.

Judgment for the plaintiff.



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Under a clause in an act giving compensation for the value of lands, tenements, and hereditaments, or for damage done thereto, the tithe owner is not entitled to compensation for the injury done to him by the conversion of tithable land taken for the purpose of the navigation, and covered with water.

THIS was a rule obtained at the instance of the Reverend *Thomas Leigh Bennett*, clerk, whereby the commissioners for putting in execution an act of parliament made and passed in the seventh and eighth years of the reign of his present majesty, “for improving the outfall of the River Nene and the drainage of the lands discharging their waters into the Wisbech River, and the navigation of the said Wisbech River from the upper end of Kinderley’s Cut to the sea, and for embanking the salt marshes and bare sands lying between the said cut and the sea,” were called on to shew cause why a writ of mandamus should not issue, directed to them, commanding them to issue their warrant or precept under their common seal to the sheriff of the county of Lincoln, commanding him to impanel, summon, and return a jury, in pursuance of the directions of the said act, to appear at the next general quarter sessions of the peace to be holden in and for the parts of Holland, in the said county, to inquire of, assess, and award and give a

verdict for the sum or sums of money to be paid by the said commissioners to the said *Thomas Leigh Bennett* as a satisfaction or compensation for the damage done in the execution of the said act to the rectory and vicarage of Long Sutton, in the said county, or the tithes thereof. Upon shewing cause against the rule so obtained, the Court ordered it to be enlarged, and directed that in the meantime the facts upon which it was to be argued should be stated for their opinion in the following case:—

By the act of parliament referred to in the rule, certain commissioners for executing the act were incorporated under the name and style of “The Commissioners of the Nene Outfall,” and provision was made for the appointment of a committee of the commissioners for executing the act. By the 34th section of this act it is enacted, “that if and when any lands, sands, tenements, buildings, or hereditaments, shall be wanted for any of the purposes of this act, it shall and may be lawful for all bodies politic, corporate or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors and administrators, and all other trustees and persons whatsoever, and for every or any of them, not only for or on behalf of themselves respectively, and their respective heirs and successors, but also for and on behalf of their respective ceteux que trust, whether infants, issue unborn, lunatics, idiots, feme covert, or other persons whatsoever under any legal disability, and for all femmes covert who shall be seised, possessed, or interested in their own right, and for all other persons whatsoever who shall be seised, possessed, or interested of or in any lands, sands, tenements, buildings or other hereditaments, which shall be wanted for any of the purposes aforesaid, and for every or any of them, to contract for and sell the same lands, sands, tenements, buildings or other hereditaments, and every or any part thereof, and by indentures of lease and release, or by indenture of bargain and sale inrolled, to convey and assure the same unto the said commissioners

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for executing this act, and their successors and assigns, absolutely and in fee simple; and that all such contracts, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever." By the 35th section of the said act it is enacted, "that all bodies corporate or collegiate, corporations aggregate or sole, trustees, or other persons hereinbefore capacitated or authorised to sell and convey any lands, sands, tenements, buildings or other hereditaments, and all other owners of the same, and all occupiers of any such lands, sands, tenements, buildings or other hereditaments, or any of them, shall and may accept and receive such compensation or satisfaction for the value of such lands, sands, tenements, buildings and other hereditaments, or for any damage that shall be done thereto in the execution of any of the works by this act authorized to be made or done, as shall be agreed upon by and between the said owners and occupiers respectively for the time being, or other parties interested, or any of them; and the said commissioners for executing this act, or their committee hereinbefore appointed, and the said commissioners, by themselves or their said committee, may and shall be at liberty to enter upon, and thenceforth for ever to have, take, and enjoy the said lands, sands, tenements, buildings and other hereditaments, for the purposes of the said act; and in case the said commissioners or their said committee, and the said owners, occupiers, or parties interested in such lands, sands, tenements, buildings or other hereditaments, cannot or do not agree as to the amount or value of such compensation or satisfaction, such amount or value shall be ascertained and settled by a verdict of a jury, as is hereinafter directed." By the 36th section of the said act it is enacted, "For settling all differences that may arise between the said commissioners for executing this act, or their said committee, and the several persons interested in any lands, sands, tenements, buildings or other *hereditaments* which shall or may be taken, used, *affected* or *prejudiced* for any of the purposes of this act, or by

reason of the execution of any of the powers hereby granted, that if any body corporate or collegiate, or any person or persons so interested as aforesaid for or on his, her, or their part or parts, or for or on the part of his, her, or their ceteux que trust, or for or on the part of any other incapacitated person or persons as aforesaid, shall refuse to accept such compensation or satisfaction as shall be offered to them, him, or her, by the said commissioners for executing this act, or their said committee, or by any person on their behalf, and shall give notice thereof in writing to the said commissioners or their said committee, or to their clerk, within seven days next after such offer shall have been made; and the party or parties giving such notice as aforesaid shall therein request that the amount of such compensation or satisfaction, or any matter in difference touching the same, may be submitted to the determination of a jury; or if any body politic, corporate, or collegiate, or any person or persons seised, possessed, or interested, either for themselves respectively or for any other person or persons, of or in any such lands, sands, tenements, buildings or other hereditaments as aforesaid, shall refuse to treat, or shall not agree with the said commissioners for executing the said act or their said committee, or with any person or persons authorised to act on behalf of the said commissioners, for the sale and conveyance of their respective estates and interest therein, or cannot be found or known, or shall not produce and evince a clear title to the hereditaments or premises in question, or to the estate or interest which they shall respectively claim therein, to the satisfaction of the said commissioners or their said committee, or of the person or persons authorised to act on behalf of the said commissioners, then and in every such case it shall be lawful for the said commissioners or their said committee from time to time to issue a warrant or precept, under the common seal of the said commissioners, to the sheriff or chief bailiff of the county, parts, or isle in which such lands, sands, tenements, buildings or other hereditaments shall lie,

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or the matter in question or dispute shall arise; or in case such sheriff or chief bailiff, or his under-sheriff or deputy bailiff, shall be immediately interested in the matter in question, then to one of the coroners of the said county, parts, or isle, not being so interested as aforesaid, commanding such sheriff, chief bailiff, or coroner, who is hereby required, on receiving such warrant or precept, to impanel, summon, and return not less than 24, nor more than 48, substantial and indifferent persons qualified to serve on juries within his jurisdiction; and the persons so to be impanelled, summoned, and returned as aforesaid, are hereby required to appear before the justices of the peace of the county, parts, or isle from which they shall be impanelled and summoned, at some Court of general or quarter sessions of the peace to be holden in and for such county, parts, or isle, as the case may be, or at some adjournment thereof, as in such warrant or precept shall be directed, and to attend such Court from day to day until discharged by the said Court; and out of such persons so to be impanelled, summoned, and returned as aforesaid, a jury of twelve men shall be drawn by the clerk of the Court or his deputy, in such manner as juries for trials of issues joined in his majesty's Courts of law at Westminster are by law directed to be drawn; and in case a sufficient number of the said persons so impanelled, summoned, and returned as aforesaid, shall not appear at the time and place appointed as aforesaid, the said clerk shall return other honest and indifferent men of the bye-standers or of others who can be speedily procured to attend that service, being so qualified as aforesaid to make up the said jury to the number of twelve, and that all parties concerned shall and may have their lawful challenges against any of the said jurymen, but shall not challenge the array; and the said clerk is hereby required, upon the application of any of the said parties interested in the matter in question, to summon before the said justices any witnesses touching the said matter, and may authorise the said jury, or any three or

more of them, to view the place or places or matter or matters in question, and such jury shall upon their oaths (which oaths as well as the oaths of such witnesses the said justices are hereby empowered to administer) inquire of, assess, and award and give a verdict for, the sum or sums of money to be paid by the said commissioners to the respective bodies, persons, or parties interested, as a compensation or satisfaction for the purchase of such lands, sands, tenements, buildings or other hereditaments respectively, or for any damage which shall have been done thereto or to the parties interested therein respectively; and the said justices shall give judgment for such sum or sums of money for which such verdict of the said jury shall have been so given as aforesaid; and the said verdict and the judgment thereupon shall be binding and conclusive to all intents and purposes upon all bodies politic, corporate, or collegiate, and upon all persons and parties whatsoever interested therein, provided that 14 days' notice in writing, at the least, of the time and place when and where such jury shall be so summoned to attend shall have been given to the bodies politic, corporate, or collegiate, or to the persons interested or claiming so to be, before the time of the meeting of the said justices and jury as aforesaid, by leaving such notices at the dwelling-house of such persons respectively, or of the head officer of such bodies politic, corporate, or collegiate respectively, or with some tenant or occupier of the premises respectively in respect of which such compensation or satisfaction shall be intended to be assessed as aforesaid." By the 37th section of the same act it is enacted, "that the several verdicts which the said respective juries shall respectively give in the execution of the powers hereby vested in them concerning the compensation or satisfaction to be made for the value of any lands, sands, tenements, buildings or other hereditaments, and for any injury or damage sustained or to be sustained as aforesaid, shall be distinct, and the said respective juries shall therein and thereby distinguish the sum or sums of money

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to be paid for the value of any such lands, sands, tenements, buildings or other hereditaments, from the sum or sums of money to be paid for any such injury or damage as aforesaid, separately and apart from each other, and also shall settle what shares and proportions of such several sums of money shall be allowed and paid to any tenant or tenants or other person or persons having a partial estate, term, or interest in the premises, for his, her, or their interest or respective interests therein." By the 39th section of the said act it is enacted, "that the said commissioners for executing this act, or their said committee, shall not, nor shall any jury to be summoned by virtue of this act, be allowed to receive or take notice of any complaint or complaints to be made by any body or bodies or person or persons whatsoever, for any injury or damage by him, her, or them really sustained or supposed to be sustained in consequence of this act, or of any thing done by virtue hereof, unless notice in writing, stating the particulars of such injury or damage, and the amount of the compensation or satisfaction claimed in respect thereof, shall have been given by or on behalf of such body or bodies or person or persons to the said commissioners for executing this act, or their said committee, or to the clerk of the said commissioners, within the space of two calendar months next after the time that any such real or supposed injury or damage shall have been sustained or supposed to have been sustained, or the doing or committing thereof shall have ceased." By the 41st section of the same act it is further enacted, "that all and every bodies or body, persons or person, requiring a jury to be summoned for any of the purposes hereinbefore mentioned, shall, before a warrant or precept shall be issued for summoning such jury, enter into a bond, with two sufficient sureties, to the said commissioners for executing this act, in a penalty of 500*l.*, with a condition to pay all such costs and expenses, or proportionate part of such costs or expenses, of impannelling, summoning, and returning such jury, and taking such

verdict and obtaining such judgment as aforesaid, as they, he, or she shall be liable to pay according to the provisions and the true intent and meaning of this act." By the 54th section of the act it is enacted, "that upon payment or legal tender of such sum or sums of money as shall have been contracted or agreed for between the parties, or determined and adjusted by any jury in manner aforesaid, for the purchase of any such lands, sands, tenements, buildings or other hereditaments, or as a compensation for damages, as hereinbefore mentioned, to the proprietor or proprietors of such lands and premises respectively, or such other person or persons as shall be interested therein, or entitled to receive such money or compensation respectively, within one calendar month next after the same shall have been so agreed for, determined, or awarded, as aforesaid, or if the person or persons so interested or entitled, or any of them, cannot be found, or shall refuse to receive the same, or shall not be able to make a good title to the premises for which the same shall be due, to the satisfaction of the said commissioners for executing this act, or of their said committee, or shall refuse or neglect to execute a conveyance or conveyances of the said premises, then upon payment or investment of such sum or sums of money into or in the Bank of England, or in such other manner as is herein directed or authorised, it shall and may be lawful for the said commissioners or their committee, and their officers, agents, servants, and workmen, immediately to enter upon such lands, sands, tenements, buildings or other hereditaments respectively, and then and thereupon the same lands, sands, tenements, buildings and other hereditaments, and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth be vested in and become the sole property of the said commissioners for executing this act, to and for the purposes of this act for ever; and such tender, payment, or investment shall not only bar all right, title, claim, interest and demand

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of the person or persons entitled to or interested in such sum or sums of money, but also shall extend to and shall be deemed or construed to bar the dower of the wife of every such person, and all estates tail and other estates in reversion and remainder, of his, her, or their issue, and of every other person whatsoever, and all other estates, rights, titles, and interests, in possession, reversion, remainder and expectancy, of all and every persons and person whomsoever, of and in the said premises. Provided nevertheless, that before such payment, tender, or investment as aforesaid, it shall not be lawful for the said commissioners for executing this act, or their said committee, or for any person or persons acting under their authority, to take or use any such lands, sands, tenements, buildings or other hereditaments as aforesaid, for the purposes of this act, without the consent of the respective owners and occupiers thereof." By section 56 provision is made for the deposit of the map or plan of the intended new cut or channel, and the lands through which the same was intended to be carried, and also schedules of references, in certain offices, to be open to the inspection of all persons on payment of certain fees. By section 57 the commissioners are authorised and required to set out and make the proposed new cut or channel, and all necessary drains, sluices and tunnels; and by section 58 the direction and dimensions of the cut are ascertained and directed to be in conformity with the map or plan. By the 59th section of the act it is enacted, "that it shall and may be lawful for the said commissioners for executing this act, and for their said committee hereinbefore appointed, and they are hereby severally fully authorised and empowered to take, retain, and make use of any lands, sands, tenements, buildings or other hereditaments, which according to the said map or plan and schedule shall appear to be required for the site of the said intended new cut or channel, and the banks; forelands, and fences thereof, not exceeding 250 yards in breadth, or which shall be or be situate within 100 yards of the back of the bank, or either side of the respective

boundary lines of the said intended new cut or channel, they, the said commissioners, making satisfaction or compensation for such lands, sands, tenements, buildings or other hereditaments which shall be so taken or made use of as aforesaid in the manner hereinbefore directed in that behalf; but that the said commissioners or their said committee shall not take or make use of any lands, sands, tenements, buildings or other hereditaments, for the site of the said intended new cut or channel of any of the banks, forelands or fences thereof, except such as are in this act respectively expressed and authorised to be taken or made use of, unless the consent in writing of the owner or owners for the time being of the lands, sands, tenements, buildings or other hereditaments which shall be so taken or made use of as aforesaid, except as aforesaid, shall have been previously given, such owner or owners being at the time of giving such consent seised of or entitled to such lands, sands, tenements, buildings or other hereditaments for one or more life or lives, or for years determinable on some life or lives, or for some estate of freehold or inheritance therein, or unless it shall appear to any two or more justices of the peace acting for the said Isle of Ely, or for the said county of Norfolk, or for the said parts of Holland, in the said county of Lincoln, wherein the said lands, sands, tenements, buildings or other hereditaments shall lie or be situate as the case may be, and shall be by them certified in writing that the omission thereof in the said map or plan or schedules, as the case shall be, proceeded from error or mistake. The Rev. *Thomas Leigh Bennett*, at whose instance this rule was obtained, was at the time of passing the act, and still is, lay impropriator of the parish of Long Sutton, in the county of Lincoln, and also vicar of the same parish, and as such lay impropriator and vicar entitled to the great or rectorial tithes, and also to the small or vicarial tithes of the same parish, according to the map or plan and schedules of reference alluded to in the act as ascertaining the course of the proposed new cut or channel; that new cut or channel will

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pass through the tithable lands of the rectory and vicarage of Long Sutton, which have hitherto produced corn or grass, and from whence Mr. *Bennett* and his predecessors have been accustomed to take and receive great and small tithes. According to that plan upwards of 200 acres of such tithable lands will be taken for the purposes of the commissioners and cut away for the making of the proposed new cut, and the surface destroyed and rendered incapable of bearing corn and grass. Before the application for this rule, the commissioners, by their workmen, commenced the cutting away of the tithable lands aforesaid in the direction of the proposed cut and according to the map or plan; and Mr. *Bennett*, at the request of the parties to whom the tithes were leased, made a reduction of 5s. per acre in the rent at which they were then demised throughout the parish; upon this, Mr. *Bennett* made to the commissioners a proposal for a certain amount of compensation to be made to him in respect of the premises, which was declined by the commissioners on the ground that he had an interest only in the produce of the soil and not in the soil itself, and that they were, therefore, not liable to make any compensation for the loss of tithes. Mr. *Bennett* has within the proper time required the commissioners to summon a jury under the 36th section of the act to inquire of, assess, award, and give a verdict for a sum of money to be paid by them to him as a compensation or satisfaction for the damage which he will sustain by reason of the premises, and has complied with the other requisitions of the act preparatory to such proceeding. The commissioners and their committee have refused to summon such jury upon the ground that Mr. *Bennett* is not a party entitled to any compensation within the meaning of the statute. Upon this refusal the present rule was obtained.

The question for the opinion of the Court is, whether Mr. *Bennett*, as lay impropriator and vicar of the parish of Long Sutton, is, under the act above cited, 7 & 8 Geo. 4, c. 85, entitled to compensation in respect of the tithable lands

of the parish being taken and cut away for the purposes of the act and the damage he will sustain as such lay proprietor and vicar, or in either character, thereby. If the Court shall be of opinion in the affirmative, a peremptory mandamus is to issue; if in the negative, the present rule is to be discharged.

The act of 7 & 8 Geo. 4, c. lxxxv. is to be taken as part of this case; and either party is to be at liberty, on the argument, to refer to any of its clauses.

*Talfourd*, for the prosecution. Mr. *Bennett* is to be compensated on two grounds. First, he is entitled to compensation by the express words of the act of parliament under which the commissioners derive their authority, on the ground that the word "hereditaments" includes tithes. Secondly, he is entitled to compensation on the ground of damage done to the rectory. The term "hereditaments" may be limited by the context; but here it must be taken to include incorporeal hereditaments (a). [*Bayley*, J. The act contains no clause which compels the commissioners to buy what they do not want for the purposes of the act. You must shew a right to the tithes before they arise.] Mr. *Bennett* has an estate in the tithes before they arise. [*Bayley*, J. The lands would not lose their tithable quality by being appropriated to the purposes of the act.] To constitute an hereditament it is only necessary that there be a descendible estate. Here there is a descendible estate, and that estate is destroyed. [*Bayley*, J. The act of which you complain prevents the tithes from

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(a) "But hæreditamentum, hereditament, is the largest word of all in that kind, for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal or mixed." Co. Litt. 6 a. And see *Quare impedit*, Dyer, 323 b. pl. 30; *West Bodwin* case, *ibid.* 350 b. 351 a; Lord *Arundel*

v. *Venn*, 2 Roll. Abr. 186; *The Marquess of Winchester's* case, 3 Co. Rep. 2 b.; *Nevill's* case, 7 Co. Rep. 34 b.; 3 Inst. 19; *Wimbish v. Talbois*, Plowd. 58; *Robert's* case, F. Moore, 176, pl. 310; *Gully v. Bishop of Exeter*, 4 Bingh. 290; 3 Com. Dig. Grant, E. 1.



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arising. Can you be said to have any interest in land because if it be used in a certain way a benefit will arise to you ?] It was said by Lord *Tenterden* in a late case (a) that statutes must be construed by looking not at the preamble or at the words of one particular clause alone, but at the language of the whole, and if in the preamble or any one clause there are found expressions less large and extensive than in other parts, and upon a view of the whole it appears that the larger and more extensive expressions used in other parts best shew what the intention of the legislature was, then it is a duty to give effect to the larger expressions, notwithstanding the more limited phrases which may be found in other places. The Court must look at the whole act, and form their judgment upon it as a whole. [*Bayley, J.* We are bound to construe a statute of this nature as if it were a private conveyance from *A.* to *B.* Questions of this kind must constantly arise upon canal acts.] Parties are entitled to compensation for rights of common, and the commoner would become entitled under the term hereditament. So of rights of way. [*Parke, J.* The parties entitled to compensation are persons who would have had a right of action if the acts in respect of which they claim compensation had been done without the authority of the legislature. All these acts of parliament are in the nature of private agreements. Lord *Mansfield* says, "The legislature only lends its aid to the agreement of the parties." A rector would have no right of action if pasture were turned into arable, although such alteration might seriously lessen the amount of his tithes. *Bayley, J.* Could Mr. *Bennett* have brought an action against the proprietors of these lands for selling them to the commissioners for a purpose not producing tithes, or in order to be thrown into the sea? Suppose it were stated in a declaration by the rector that the defendant wrongfully sold land to be applied to a purpose from which no tithes

(a) *Doe v. Brandling*, ante, i. 605.

could arise, could such a declaration be supported? Legal injuries only are to be compensated. You may remember a case in which the lord of the manor, being on bad terms with the rector, suffered all the lands in the parish to lie waste.] Supposing the whole parish to be taken away, it could not be contended that the rector had sustained no damage. The question is whether by the term "party interested," the Court is bound down to the strict meaning of the phrase "legal interest."

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*T. Clarkson*, contra, was stopped by the Court.

BAYLEY, J.—It appears to me that this act is to be construed, as all other private acts ought to be, as if it were a private agreement. The parties who are to agree are persons who shall be seised, possessed or interested of or in any lands, tenements, buildings, or hereditaments which shall be wanted for any of the purposes aforesaid. This clause must apply where there is a legal interest, which the parties are by the act enabled to part with, and it applies to those persons only who are seised, possessed, or interested. I cannot say that the lay impropiator or the vicar is interested in the land. If it be contended that the right exists, it will be proper to see whether there is any remedy for the invasion of the right. It has been put what the case would be if the whole parish were so dealt with; that is an argument to be addressed to the legislature, not to a court of law.

LITTLEDALE, J.—I do not remember a single instance in which a rector has claimed to be entitled to compensation for loss of tithe occasioned by land being applied to a purpose which rendered it incapable of producing tithe. I never heard of such a clause in any act of parliament; and without such a clause the rector would certainly not be so entitled. Tithes are not a species of hereditament contemplated by the act; the tithe owner has no right to tithes

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until they are absolutely renewed. Then the compensation for damage spoken of in the act, must mean a legal damage, such a damage as Mr. *Bennett* might have brought an action for, if it had been occasioned by the proprietor, without the intervention of an act. The tithe owner may be said to sustain damage by reason of the land not being cultivated; but that is not such a damage as the law recognises. If a clause had been introduced into the act for the benefit of the rector, it would probably have been to give him some part of the compensation assessed in respect of the land; in this act the whole compensation is given to the landowner.

PARKE, J.—I am of the same opinion. The application is resisted on two grounds. First, that it was the land in question that was wanted for the purposes of the act, tithes not being wanted by the commissioners. Secondly, that the parties are not strictly interested. This is an act enabling persons to sell, and compelling them to submit to the verdict of a jury in case they cannot agree with the commissioners. It is said that a different construction must be put upon this clause, from the supposed intention of the legislature. I do not think that any such intention appears. The object of the act was to enable and compel parties to sell. After a sale for these purposes, no claim for damages can be supported. No person who consented to the appropriation of his land for this purpose would be liable to an action for so doing. The meaning of the clause was not to arm the commissioners with power to do that which they could not have done without. A right of way or common would entitle the owner to compensation; the rector or vicar is not so entitled. There is no reason for putting a different construction upon the word interest in this statute from that which it would bear in other cases. I do not, therefore, think Mr. *Bennett* entitled to the compensation claimed. If the proprietors of lands had made the cut without the intervention of the act, no legal injury

would have accrued to Mr. *Bennett*; he could not have maintained any action against them. I do not think Mr. *Bennett* entitled to any compensation either for lands taken for the purpose of the act, or for any damage done to lands by the execution of the works.

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TRESPASS, for breaking and entering the plaintiff's shop. Plea, that one *Stokes* being seised in fee of the shop, before the committing of the alleged trespass, to wit, on the 26th July, 1826, demised to the defendant *Hewett*, to hold from year to year so long as they should respectively please, by virtue whereof *Hewett* entered, and was possessed of the shop as tenant to *Stokes*; and that the plaintiff claiming title under colour of a pretended charter of demise, entered, &c. Replication, that before the trespass, and while *Hewett* was in possession, to wit, on the 25th December, 1826, *Hewett* demised the premises to the plaintiff "to have and to hold the same to the plaintiff for one whole year from thence next ensuing and fully to be complete and ended, and so from year to year as long as they should respectively please during the continuance of the said demise thereof to *Hewett* from *Stokes*;" by virtue whereof the plaintiff entered and was possessed at the time of the trespass. Rejoinder, taking issue on the demise, modo et formâ, and concluding to the country. At the trial before *Parke*, J. at the Oxford summer assizes, 1828, a demise by *Hewett* to the plaintiff of the shop from year to year generally was proved; but that demise was not limited to the continuance of *Hewett's* interest, nor was the nature of that interest mentioned in it. It was objected for the defendants that the evidence failed to support the replication in two respects, first, as not shewing that the

A demise from year to year generally, by a tenant from year to year, is, in legal effect, a demise from year to year, during the continuance of such tenant's term, and may be properly pleaded as such.

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contract between *Hewett* and the plaintiff limited the plaintiff's interest to the continuance of *Hewett's* interest; and secondly, (if it must be taken that the legal effect only of the contract, and not the real contract itself was stated,) as shewing that the legal effect of the contract was not truly stated. The learned judge directed the jury to find a verdict for the plaintiff, but gave the defendants liberty to move to enter a nonsuit.

*Jervis*, in Michaelmas term last, moved accordingly, and renewed both objections, citing in support of the second the case of *Pleasant v. Benson (a)*. The Court were clearly of opinion that the replication must be taken to state the legal effect of the contract only, and not the contract itself, and, therefore, refused the rule on the first ground; but on the second ground they granted a rule nisi, against which

*Peake*, Serjt., and *Talfourd*, now shewed cause. *Hewett* could only demise during the continuance of his own interest; the demise, therefore, is properly limited to the continuance of *Hewett's* interest, and is correctly stated according to its legal effect. When this rule was moved for, *Pleasant v. Benson* was relied upon as shewing that the plaintiff's interest might continue beyond that of *Hewett*, in case *Hewett* surrendered his term to his landlord pending that of the plaintiff; but the case does not bear out the proposition. There, tenant from year to year underlet part of the premises, and then gave up to his landlord the part remaining in his own possession, without either receiving a regular notice to quit the whole, or giving notice to quit to his sub-lessee, or even surrendering that part in the name of the whole. It was held that the landlord could not entitle himself to recover against the sub-lessee, there being no privity of contract between them, upon giving half a year's notice to quit in his own name, and not in the name of the first lessee: for as to the part so under-

(a) 14 East, 234.

let, the original tenancy still continued undetermined. Properly considered, that case rather shews that the demise in the replication is correctly stated in this case; for if *Stokes* had determined *Hewett's* tenancy by a regular notice to quit, he would thereby have determined the plaintiff's tenancy also; but a surrender by *Hewett* of his interest would have had no such effect, because *Hewett's* tenancy would still have subsisted for the purpose of supporting that of the plaintiff. Suppose such a surrender to have been made, the plaintiff would still continue tenant not to *Stokes*, but to *Hewett*, who would be the only person entitled to distrain: in every view of the case, therefore, the demise to the plaintiff was a demise during the continuance of *Hewett's* interest only.

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*Jervis* and *Follett*, *contra*. There is a fatal variance between the demise laid in the replication and that proved in evidence, for the former was a demise from year to year, during the continuance of another demise, and the latter was a demise from year to year, absolutely. Now those are two very different things. For instance, a demise from year to year, absolutely, would continue notwithstanding a surrender by the party demising; *Co. Litt.* 338, b; *Doe v. Pyke* (a). So, it would continue beyond the existing demise if the interest of the termor merged in some greater interest, as by his purchasing the fee. A lease for 21 years, made by tenant for life, would be ill described in pleading as a lease for 21 years, determinable at the death of the lessor; yet that is a parallel case with the present. At any rate the demise as pleaded here, reserves, impliedly, to *Hewett*, power to determine the demise at any time, by determining his own tenancy; which certainly cannot be supported by evidence of a general demise, not referring to any superior tenancy. The case of *Pleasant v. Benson* (b) is decisive of the present.

(a) 5 M. & S. 146.

(b) 14 East, 234.

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The Court took time to consider of their judgment, which was now delivered by

BAYLEY, J.—The only question in this case was, whether the averment in the replication, upon which issue was taken, was sustained by the evidence. That averment was, that while *Hewett* was possessed, under the demise made to him by *Stokes*, he demised to the plaintiff for one year, and so from year to year, “*during the continuance of the said demise to Hewett from Stokes.*” The evidence was of a demise by *Hewett* to the plaintiff from year to year generally. We are of opinion that the replication does not profess to describe the actual contract between the parties; but that it merely intends to plead, as it properly ought to do, *Com. Dig. Pleader, (C), 43*, the demise according to its legal effect. That being so, the question is whether this was the legal effect of the general demise by *Hewett*. We feel it unnecessary to decide whether the replication is to be taken to state all the interest that passed; for assuming that it is, we think it does correctly state it. It was argued that it does not, because the incidents or qualities of a term from year to year granted by a termor from year to year generally, are different from those of a term granted by him, *during the continuance of his own term*. We are, however, of opinion that the incidents or qualities of this demise are not misdescribed. First, it was said, that the term from year to year granted to the under-lessee, generally, would continue, though the lessee surrendered his term, or merged it; that is, that it would continue *longer than during the continuance of the demise to the lessee*; but not so a demise made during the continuance of the first demise; and *Co. Litt. 338, b.* was cited. Now the authority gives an answer to the objection, for it says, “but having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice, touching any right or interest they had before the surrender, the estate surrendered hath, *in consideration of law, a*

*continuance.*" Therefore, though *Hewett* might have surrendered, his estate, as regards the lessor of the plaintiff, would have continued: and in either case, the demise by *Hewett* would continue during the continuance, in legal effect, of his term, and no longer. Then, secondly, it was said, that a term granted generally would continue after the expiration of the first tenancy by efflux of time, if the termor had previously purchased the fee; but not so a term granted *during the continuance of his term*. The answer is, that it would be good by estoppel only, and this is not a demise by indenture, which is essential to an estoppel. A third objection was founded upon an assumed analogy between demises from year to year, and leases by tenants for life. But there is really no such analogy. Such estates are, in contemplation of law, of longer duration than estates for years; and an interest for years, however long, passes from a grantor seised for life. Lastly, it was objected, that the terms used in the replication, that *Hewett* demised "to hold during the continuance of his own demise," properly describe a demise in which he reserves to himself the power of determining his own estate when he pleases by surrender; and that the proof was of a demise reserving no such power. But we think the terms used in the replication mean during the *continuance* of the demise to *Hewett*, from year to year *in its ordinary course*. For these reasons we are of opinion that the replication properly describes the legal effect of the demise which was proved at the trial, and, therefore, that the rule for entering a nonsuit ought to be discharged.

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Rule discharged.





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DOE, on the demise of W. WILKINS, v. The Marquess of CLEVELAND and J. PARSLEY.

Livery of seisin of land cannot be presumed from a feoffee's possession of less than twenty years.

An indorsement on a feoffment, that A. delivered seisin in the presence of B., is no evidence of the fact, against the party out of whose possession the feoffment comes, but who does not claim under it.

**EJECTMENT** for a cottage and garden situate in the parish of Wrington, in the county of Somerset. At the trial before *Gaselee, J.*, at the Lent assizes for that county, 1829, the case was this:—The lessor of the plaintiff was the heir at law of one *J. Wilkins*, who died 24th February, 1817. The defendant, the Marquess of *Cleveland*, was lord of the manor of Wrington. The site of the cottage and the garden in question had been once part of the waste of the manor. It had been inclosed, and was, in 1790, in the possession of one *C. Lovell*, who exercised acts of ownership upon it. He remained in possession till 1812, but by indenture of 13th of January, 1811, made between him and *J. Wilkins*, in consideration of 5*l.* 5*s.* paid to *Lovell* by *J. Wilkins*, *Lovell* gave, granted, sold, aliened, enfeoffed and confirmed to *J. Wilkins*, his heirs and assigns, all that plot, piece, or strip of garden ground then in the possession of *Lovell*, situate in the parish of Wrington, in the county of Somerset, bounded as therein mentioned, together with all ways, &c., to hold to and to the use of *J. Wilkins*, his heirs and assigns, for ever. The deed contained a general warranty of title, and a power of attorney from *Lovell* to *R.* and *T. Gallop* jointly, and to either of them separately, to enter upon the premises and deliver seisin. The deed was executed by *Lovell*, and attested by two witnesses. There was a receipt indorsed and signed, and a “memorandum that on the 8th of February, 1812, peaceable and quiet possession and seisin were taken and delivered by *R. Gallop*, one of the attorneys within named, to the within named *J. Wilkins*, according to the tenor and effect of the within deed. Witness, the mark X of *T. Chard*.” This memorandum, the attestation excepted, was proved to be in the handwriting of *R. Gallop*; it was not shewn by whom the attestation was written. *R.* and *T. Gallop* were proved to be dead, but no account of any sort was given of *Chard*. *J. Wilkins* took

possession of the land, and built a cottage upon it, which he let to one *Dyer*, from Lady-day, 1814, at six guineas a year, and received the rent as long as he, *J. Wilkins*, lived: he died in February, 1817. His widow received the rent from that time to Lady-day, 1820, when the defendant *J. Parsley* became tenant, and she received the rent from that time until and after the granting of a lease, on 25th September, 1825, by the defendant the Marquess of *Cleveland*, for her life, which she accepted, and delivered up the feoffment to his steward. The defendants had agreed, before the trial, to produce and admit the execution of the feoffment, which was done by them accordingly. It was contended for the defendants, that the lessor of the plaintiff had not proved any livery of seisin. It was answered, that livery of seisin might be presumed from the possession which had followed the deed from 1812 to 1820. The learned Judge left it to the jury to presume livery of seisin, and they found for the plaintiff. Leave was given to the defendants to move to enter a nonsuit, and a rule nisi having afterwards been obtained accordingly,

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*Merewether*, Serjt., and *Erle*, now shewed cause. It is laid down in *Bacon's Abridgement* (a), that "if a deed of feoffment be proved, and the possession have gone along with the deed, then the livery shall be presumed, though it be not proved; for where there has been possession in the manner that the deed sets forth, it founds a very strong presumption that the possession was delivered in the manner that the deed sets forth; for that there should be a contract to transfer possession, and that possession should go according to that contract, are such concurring circumstances as cannot be accounted for, unless the possession was transferred according to the contract, and consequently the livery of seisin must be supposed by the jury." Now in this case the execution of the deed of feoffment was admitted; and it was proved that the possession was transferred according

(a) 2 Bac. Abr. "Evidence," 648.

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to the contract stated in the deed of feoffment. That evidence raised the presumption of livery of seisin, and that presumption was properly left to the jury. But it will be said, that as there was an attesting witness to the memorandum of livery of seisin indorsed upon the deed of feoffment, he ought to have been produced, or his absence accounted for. The answer is, that the deed of feoffment was produced by the defendants, and that it is an established rule, that if an adverse party who produces a deed takes any beneficial interest under it, or has recognised it as a valid instrument, the party calling for the deed is relieved from the duty of proving its execution: *Pearce v. Hooper* (a), *Orr v. Morice* (b), *Burnett v. Lynch* (c), *Doe v. Hemming* (d). Here, the Marquess of *Cleveland* has undoubtedly acknowledged the deed of feoffment as a valid instrument, by granting Mrs. *Wilkins* a beneficial lease as a consideration for her delivering up the deed of feoffment; and perhaps he may have become beneficially interested in the deed, for the interest which *Wilkins* formerly had, may, by the arrangement alluded to, have passed to him, the Marquess.

*Bompas*, Serjt., contra. The memorandum of livery of seisin indorsed upon the deed of feoffment being attested, the fact of livery should have been proved by the attesting witness. The presumption arising from possession is not evidence of livery without due proof of the deed of feoffment, and there was not such proof here. The passage cited from *Bacon's Abridgement* is not to be found in the early editions of that work; they speak of presumption in a case like the present, in terms similar to those used in the first *Institute* (e), where it is said, "in the case of a charter of feoffment, if all the witnesses to the deed be dead, (as no man can keep his witnesses alive, and time weareth out all men,) then violent presumption, which stands for a proof,

(a) 3 Taunt. 60.

(b) 6 J. B. Moore, 347; 3 Brod. & Bingh. 139.

(c) 8 D. & R. 368; 5 B. & C. 589.

(d) 9 D. & R. 15; 6 B. & C. 28.

(e) Co. Litt. 6 b.

is continual and quiet possession; for, *ex diuturnitate temporis omnia præsumuntur solemniter esse acta.*" Now, in order to constitute this violent presumption, the continual and quiet possession ought to extend over a period of, at least, *twenty* years. In *Isack v. Clarke* (a), *Coke*, C. J., said, "If a deed of feoffment be given in evidence to have been made *forty* years past, but it cannot be proved that livery was made, yet if possession has all along gone with the deed, this is good evidence to the jury." In *Biden v. Loveday* (b) it is said, that after long possession, as for *twenty-five* years, livery of seisin shall be presumed. In *Rees v. Lloyd* (c), *M'Donald*, C. B., expressed his opinion that it might be presumed after *twenty* years' possession. Now, in the present case, only *seventeen* years have elapsed since the execution of the feoffment; and for the last three or four years the premises have been held under a lease granted by the Marquess of *Cleveland*. Neither was the necessity of strict proof of the deed by the plaintiff waived in this case by the fact of its coming out of the possession of the defendants. The cases cited upon that point are all distinguishable from the present; for here the Marquess of *Cleveland* never either admitted the validity of the deed or claimed any interest under it; besides, here it was the plaintiff's duty to prove not merely the execution of the deed, but a fact independent of it, namely, livery of seisin.

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(a) 1 Roll. Rep. 59; S. C. per nom. *Isaack v. Clark*, 2 Bulstr. 306; F. Moore, 841, pl. 1136; 10 Co. Rep. 56, 7. And see 2 Bulstr. 314, where *Coke*, C. J., is reported to have said, "If a deed, purporting a feoffment, be brought before any judge in trial, made *forty* years before, and the possession gone continually with the deed, this is good evidence to a jury to find with the deed, 1 H. 8. A charter of feoffment made, and ever since posses-

sion continued; this may well be given in evidence to a jury, but not good in pleading, for no judge dares say to a jury, that if no livery was made, that yet this is a good deed."

(b) Vern. 196, cited.

(c) Wightwick, 123. See *Jackson v. Jackson*, Fitz-Gibbon, 147; *Throckmorton v. Tracy*, Plowd. 149; *Burgh v. Francis*, 1 Eq. Ca. Abr. 320.

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Lord TENTERDEN, C. J.—The lessor of the plaintiff must recover by the strength of his own title. In this case he claims as heir at law, and must therefore shew a freehold interest either in himself or in his ancestor. The proper mode would have been to shew that *Lovell* enfeoffed his ancestor. I must not be understood as deciding that even if a feoffment and livery of seisin had been duly proved, it would have constituted a good title under the circumstances of this case. But supposing that it would, still, in order to make a good title by feoffment, there must be livery of seisin. In this case a charter of feoffment was admitted; and the question is whether livery of seisin was proved, or could be presumed. The period at which the feoffment was made, only seventeen years before, was certainly not such as to warrant the jury in presuming that livery had been made. The memorandum indorsed on the feoffment purports that one *Chard* was present and saw livery of seisin given; but that is no evidence of the fact; and I am clearly of opinion that that memorandum should not have been received in evidence. It is said that as the deed came out of the possession of the defendants, the plaintiff was not bound to prove the fact attested by *Chard*. Now the land sought to be recovered was originally part of the waste, which belonged to the Marquess of *Cleveland* as lord of the manor. The probability, therefore, is, that the Marquess claimed the land, and that Mrs. *Wilkins*, to prevent disputes, agreed to deliver up the feoffment, and to accept a lease for her life. But the Marquess never claimed any interest under the feoffment, and never admitted it to be a valid instrument; therefore the fact of its coming out of his possession did not relieve the plaintiff from the duty of proving its execution. There was, therefore, in this case no proof of livery of seisin, which the plaintiff was bound to prove in order to make out a title; but as his legal advisers may have supposed that the admission of the feoffment extended to the livery of seisin, I think the rule should be made absolute for a new trial only, and not for a nonsuit.

BAYLEY, J.—I also think there should be a new trial in this case. The indorsement on the feoffment was a mere memorandum that *Gallop* did a particular act in the presence of *Chard*; as such it was not receivable in evidence. Neither was it receivable in evidence on the ground that the feoffment came out of the possession of the opposite party, because the defendants did not claim under the feoffment.

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LITLEDALE, J. concurred (a).

Rule absolute for a new trial.

(a) *Parke, J.*, was sitting at Nisi Prius.

#### CODLING v. JOHNSON.

**TRESPASS**, for breaking and entering plaintiff's close with horses, carts, &c. Plea, a prescriptive right of way in one *Bourne*, for himself and his servants, tenants and occupiers of a certain close, from a certain highway over the locus in quo, to the said close of *Bourne*; justifying as his servant, and by his command. Traverse of the right of way. At the trial before *D'Oyley*, Serjt., at the Nottinghamshire summer assizes, 1828, the plaintiff proved that *Bourne's* close was, down to 1771, part of an open common, which was inclosed in that year under the provisions of an act of parliament, and that that close was allotted to *Bourne's* ancestor. The defendant proved the user of the way by persons having a right of common over *Bourne's* close for some years prior to the inclosure. It was objected, that as the close was a modern inclosure, a right of way to it could not be claimed by prescription. The learned serjeant replied to the point, and desired the jury to find the fact whether there was or was not a right of way over the locus in quo to *Bourne's* close. The jury found that there was in

A plea of way by prescription over *A.* to *B.* is not disproved by shewing that 48 years ago *B.* was part of a common inclosed under an act of parliament, and allotted to the party under whom the defendant justifies.

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fact such a right of way, and the defendant had a verdict. A rule nisi having in last Michaelmas term been obtained for entering a verdict for the plaintiff with nominal damages,

*Adams*, Serjt., and *Hill*, shewed cause. The jury found that the plea was proved; there is, therefore, an end of the question. The fact that the close, in respect of which the way was claimed, had been once part of an open common, cannot vary the case; for the fee must then have been in some person who might have had the right of way; and the jury have found the fact, that the owner of the close now belonging to the defendant was possessed of the right of way.

*N. R. Clarke*, contrà. The plea was not proved; therefore the finding of the jury in that respect was false, and must be corrected. If the way did exist from time immemorial, it must have belonged to the commoners prior to the inclosure, and they must have used it in respect of the land to which the right of common was appurtenant, and not in respect of the right of common itself.

BAYLEY, J.—I think this rule ought to be discharged. It seems to have been proved to the satisfaction of the jury, that this right of way had existed from time immemorial. Suppose this land, prior to the inclosure, to have been parcel of the waste, the lord may have had the right of way for himself and his tenants, and then every person taking an allotment under the inclosure act would take the right of way with it. There was evidence that those who had taken allotments had exercised the right of way; from that the jury might infer that the lord originally had the right of way, and that it passed with the allotments; and if that is so, the verdict is right.

LITTLEDALE, J.—If the user proved had been since the inclosure only, I think that would not have supported the

plea; but there was evidence that the way existed before the inclosure. At that time the land was either common, or waste subject to rights of common. If it was common, the probability is that each proprietor had a right of way to his own land; if it was waste, the lord might have the right of way for himself and the commoners, and then it would pass with the allotments. In either point of view the verdict is right.

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PARKE, J.—It was left to the jury to find, as a fact, whether the immemorial right pleaded was proved. They found that it was; and I am not aware of any rule of law which militates against that finding. The usage warranted the jury in inferring that the lord was owner of the fee, and had the right of way, before the inclosure. The verdict, therefore, is right.

Rule discharged.

WOOD *v.* WILLIAM NORTON, BENJAMIN NORTON, and  
 JOSEPH NORTON.

**DEBT**, on bond dated 15th April, 1826, for 12,000*l.* A bond and a mortgage executed on the same day, for securing the same sum of money, but bearing different dates, require an ad valorem stamp on each instrument.  
 Plea, *non est factum*; and issue thereon. At the trial before Bayley, J. at the York Lent Assizes, 1829, the case was this:—The three defendants were brothers. William, owing the plaintiff 3700*l.* applied to him for a further advance of 2300*l.*, proposing to secure the whole 6000*l.* by mortgage, and by the joint and several bond of himself and his brothers. The plaintiff agreed to this proposal, and the mortgage and bond were prepared, the mortgage being by indentures of lease and release and assignment, bearing date respectively 12th and 13th of April, 1826. The bond, on which the plaintiff sued, bore date 15th April, 1826, and had only a 20*s.* stamp. The release had a stamp denoting payment of the ad valorem duty. All the securities were executed on the 15th April, on which day the 2300*l.*



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was advanced. It was objected for the defendants, that as the release which had the stamp denoting payment of the ad valorem duty did not bear even date with the bond, the latter should have had a 12*l.* stamp, the ad valorem duty for a sum of 5000*l.* and not exceeding 6000*l.* The learned judge yielded to the objection, and nonsuited the plaintiff, giving him leave to move to enter a verdict in his favour. A rule nisi having been obtained accordingly,

*Brougham* now shewed cause. This is not a bond within the description in the 55 *Geo. 3*, c. 184, sched. part 1, given as a security for the payment of any sum of money, in part secured by a mortgage or other instrument, *bearing even date with such bond*; for here the mortgage bears a different date from the bond: the bond, therefore, ought to have borne the ad valorem stamp, and was properly rejected in evidence for want of it.

*J. Williams*, contra. This bond was duly stamped within the spirit and meaning, if not within the very words, of the act of parliament. All the securities were executed on the same day, and all referred to one transaction. They were all, therefore, "made at the same time," within the language of one part of the schedule. The words "bearing even date," in another part of the schedule, do not govern this case; for the lease and release could not by possibility bear date on the same day, nor could the bond, consequently, bear even date with both the lease and the release. The other words, therefore, must govern this case. They are in the schedule, title *Mortgage*, as follows:—"Provided always, that where several distinct deeds or instruments falling within the description of any of the instruments hereby charged with the said ad valorem duty on mortgages, *shall be made at the same time*, for securing the payment of one and the same sum of money; the said ad valorem duty, if exceeding 2*l.*, shall be charged only on one of such deeds or instruments, and all the rest shall be

charged with the duty to which the same may be liable, under any more general description of such deeds or instruments contained in this schedule; and if required for the sake of evidence, all the rest of such deeds or instruments shall be also stamped with some particular stamp for denoting the payment of the said ad valorem duty, on all the said deeds or instruments being produced, duly stamped with the duties hereby charged thereon." That the legislature intended to require that a stamp denoting payment of the ad valorem duty should be impressed on one of the instruments only, is clear from the language of the subsequent statute, 3 *Geo.* 4, c. 117, s. 3, which enacts, "that where any deed or other instrument shall be made as an additional security for any sum of money already or previously secured by any bond, on which the ad valorem duty on bonds charged by the 55 & 56 *Geo.* 3 shall have been paid, such deed or other instrument shall be exempt from the several ad valorem duties charged by the said acts on mortgages, and shall be charged only with the ordinary duty payable on deeds generally; but if any further sum of money shall be added to the principal money already secured, the said ad valorem duties respectively shall be charged in respect of such further sum of money." These enactments, taken all together, clearly shew, that in a case like this, where there are several instruments made at the same time, and relating to the same transaction, the legislature intended it to be sufficient if any one of them bore a stamp denoting the payment of the ad valorem duty.

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Lord TENTERDEN, C. J.—The words "bearing even date," in the statute 55 *Geo.* 3, c. 184, sched. part I. title *Bond*, are conclusive of this case; because they clearly and plainly confine the operation of that clause in the schedule to the date written on the instrument. The bond in this case does not bear even date with the release, on which the stamp denoting payment of the ad valorem duty is impressed; the bond, therefore, is not within the operation

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of that clause in the schedule. But it is said that coupling that with a subsequent clause in the schedule, title *Mortgage*, it appears to have been the intention of the legislature, that where several instruments for securing the same sum of money are "made at the same time," and any one of them bears a stamp denoting the payment of the ad valorem duty, that shall be sufficient, and the others shall be receivable in evidence without an ad valorem stamp. But the clause in which the words "made at the same time" occur, requires something more to be done in order to make such instruments admissible in evidence; namely, that they shall all be stamped with some particular stamp for denoting the payment of the ad valorem duty, on all the instruments being produced, duly stamped with the duties thereby charged thereon. Now that has not been done in the present case. The bond, therefore, was not properly stamped, and was not receivable in evidence. It follows that the rule for entering a verdict for the plaintiff must be discharged.

BAYLEY, J. and LITLEDALE, J. concurred.

PARKE, J. was sitting at Nisi Prius.

Rule discharged.

COCKS and others v. MASTERMAN and others.

The holder of a bill of exchange is entitled to know on the very day the bill becomes due whether it is dishonoured or not.

**ASSUMPSIT**, on the money counts. Plea, the general issue. At the trial before Lord *Tenterden*, C. J., at the London sittings after Michaelmas term, 1827, a special verdict was found, substantially, as follows:—

Long before and at the several times hereinafter men-

Therefore, where the bankers of the drawee pay the amount to the holder on the day the bill becomes due, and on the following day discover the acceptance to be a forgery, and give the holder notice of the fact, they cannot recover back the amount from the holder.

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tioned, the plaintiffs carried on business as bankers at Charing Cross, Westminster, and the defendants carried on business as bankers in Nicholas Lane, London. Before and on and after the 24th May, 1827, certain persons carrying on trade under the firm of *Sewell and Cross* kept an account and cash with the plaintiffs as their bankers; and certain other persons carrying on trade under the firm of *Sanderson and Co.* kept an account and cash with the defendants as their bankers. Before the said 24th May, a bill of exchange, drawn by one *T. Dutton* upon *Sewell and Cross*, dated 21st March, 1827, for £198: 19s., payable two months after date to the order of *T. Dutton*, and indorsed by *T. Dutton* and also by one *C. Heginbotham*, and one *J. Harris*, and purporting to be accepted by *Sewell and Cross*, payable at the plaintiffs', was paid to the defendants by *Sanderson and Co.* to their credit with the defendants. Upon the said 24th May, the defendants presented the said bill to the plaintiffs for payment, who, believing the acceptance to be that of *Sewell and Cross*, paid to the defendants the amount of the said bill. On the 25th May, the day after such payment was made, the plaintiffs discovered that the acceptance on the bill was not the acceptance of *Sewell and Cross*, but that the same was forged by *T. Dutton* the drawer of the bill. The said acceptance was in fact so forged. On the same 25th May, about one o'clock, the plaintiffs gave notice to the defendants, to *J. Harris* the indorser, and to *Sanderson and Co.*, that the same was so forged, and that the said payment had been made by them under a mistake, and in ignorance of the acceptance being so forged, and they requested the defendants to repay them the said sum of £198: 19s. On the same day, one *T. Gates*, as attorney for the bankers' society for protection against forgers, and of which society the plaintiffs and defendants were members, sent the following letter to *C. Heginbotham*, the other indorser, and also a like one to *J. Harris*:—"Sir.—A bill of exchange bearing your indorsement, for £198: 19s., drawn by *T. Dutton*, and pur-

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porting to be accepted by *Sewell* and *Cross*, and indorsed by you to *J. Harris*, due yesterday, has been refused payment, and now lies with me, the acceptance being forged; and if the same is not taken up by ten o'clock to-morrow, legal proceedings will be taken against all parties." The sum of £198: 19s. was entered by the plaintiffs in the day-book to the debit of *Sewell* and *Cross*, but was not carried into the ledger or further charged to their account. *Sanderson* and Co. did not draw out of the hands of the defendants any sum of money upon the credit or in respect of the said bill, and the balance of moneys belonging to *Sanderson* and Co. in the hands of the defendants as their bankers, before, and at, and after, the several days before mentioned, greatly exceeded the said sum of £198: 19s.

The case was argued by *R. V. Richards* for the plaintiffs, and *F. Pollock* for the defendants.

*Cur. adv. vult.*

Judgment was now delivered by

BAYLEY, J.—This was an action brought by *Cocks* and Co. bankers at Charing Cross, to recover a sum of money, the amount of a bill of exchange, paid by them to the defendants, on the ground that they had paid the money under a mistake and in ignorance of the facts, and were therefore entitled to recover it back. The bill was presented for payment on the 24th of May, the day on which it became due. The plaintiffs paid it, not knowing that it was not the genuine acceptance of *Sewell* and *Cross*. On the following day it was discovered that the acceptance was a forgery, and the plaintiffs on that day gave notice to the defendants. It was insisted that the plaintiffs were not entitled to recover, inasmuch as they, being bankers, were bound, before they paid the bill, to satisfy themselves that the acceptance was genuine. On the other hand it was contended that the plaintiffs, having given notice of the forgery to the

defendants on the day next after that on which the bill was paid, were entitled to recover back the amount, on the ground that they had paid the money under a mistaken belief that the acceptance was a genuine acceptance of *Sewell and Cross*; and the case of *Wilkinson v. Johnson* (a) was relied on. But that case differs from the present in one material point, namely, that there the notice of the forgery was given on the very same day on which the payment was made, so as to enable the defendants to send notice of the dishonour to the prior parties on that day. In this case we express no opinion upon the point, whether the plaintiffs would have been entitled to recover if notice of the forgery had been given to the defendants on the very same day on which the bill was paid, so as to enable the defendants on that day to have sent notice to the other parties on the bill. But we are all of opinion that the holder of a bill is entitled to know, on the very day on which it becomes due, whether it is honoured or dishonoured, and that if he receives the money, and is suffered to retain it during the whole of that day, the parties who paid it cannot recover it back. It is true that the holder is not bound by law, where the bill is dishonoured by the acceptor, to take any steps against the other parties on the bill until the day after it is dishonoured. But he is entitled to do so, if he thinks fit; and the parties who pay the bill cannot be allowed by their negligence to deprive the holder of any right or privilege. If we were to hold in this case that the plaintiffs are entitled to recover, it would be, in effect, deciding that the plaintiffs might by their negligence deprive the holder of his right to take steps against the other parties on the bill on the day when it becomes due. Upon this ground we are all of opinion that the defendants are entitled to the judgment of the Court.

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#### Judgment for the defendants (b).

- (a) 5 D & R. 403; 3 B. & C. 428. sent at the argument, and concurred in this judgment.  
 (b) It was understood that the Lord Chief Justice had been pre-

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## The KING v. The Inhabitants of ST. JOHN, DEVIZES.

A pauper hired herself under a written agreement to work in a factory for four years at weekly wages, and "to observe all the rules with regard to the hours of attendance and of work." The rules were not reduced into writing, and were occasionally varied by the master, but the pauper was told that she must work twelve hours a day:—Held, first, that this was not an exceptive hiring, and that due service under it conferred a settlement; and secondly, that the parol communication made to the pauper was not admissible evidence to explain the written agreement.

ON appeal against an order for the removal of *Prudence Abrahams* from Chippenham to Devizes, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, being at the time settled in St. John, Devizes, on the 6th February, 1826, was hired by the foreman of a Mr. *Spiers*, under the following agreement, which was signed by the parties named in it:—

"*Prudence Abrahams*, of Brumham, in the county of Wilts, silk winder or weaver, with the consent and approbation of her father *Robert Abrahams*, hereby hires herself to Mr. *Spiers*, of Chippenham, to work in his factory as silk winder or weaver, for four years from this day. Mr. *Spiers* agrees to pay for the services of the said *Prudence Abrahams*, for the first year three shillings a week, for the second year four shillings a week, for the third year five shillings a week, and for the fourth year six shillings a week, subject to a proportionate reduction being made for loss of time occasioned by sickness, or her being otherwise absent from work. And it is hereby agreed that the said *Prudence Abrahams* shall in all things observe and obey all the rules and regulations of the said Mr. *Spiers*, as well with regard to the hours of attendance and of work, as the mode and other particulars of working; and shall in all things whatsoever conduct herself faithfully, honestly, and diligently in her said engagement, and as a good servant ought to do. It is also agreed that in case the said *Prudence Abrahams* shall unnecessarily waste, or otherwise lose, destroy, or make away with the silk entrusted to her, she shall pay such reasonable compensation to Mr. *Spiers* as his superintendent shall appoint. If at the expiration of the above period the said *Prudence Abrahams* shall have behaved well, shall have done her work well, and shall in every respect have duly performed this engagement, but

not otherwise, Mr. *Spiers* promises to give the said *Prudence Abrahams* the sum of 3*l.* as a gratuity and reward for her good conduct, over and above the weekly wages above specified, subject nevertheless to any deduction which may have accrued in respect of absence by reason of sickness or otherwise above mentioned."

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When the pauper executed the agreement the foreman told her that she must observe the working hours, and if certain work was not done, must work twelve hours a day. The pauper entered on her service the day she executed the agreement. Rules for the factory had not at that time been reduced to writing. The foreman said they existed only in the breast of the master, but were known to and acted on by the work people. They were during the service of the pauper occasionally altered in some respects by the master alone; but the foreman stated that the rule as to the hours of work was never changed. Time, however, was at first allowed for tea, which allowance was afterwards revoked by the master's sole authority. Under this hiring the pauper served a year in Chippenham, and becoming afterwards chargeable, was removed to St. John, Devizes, which removal was the subject of appeal. The questions were, whether this was an exceptive hiring, and whether the parol evidence was properly received.

*Bingham* and *Follett*, in support of the order of sessions. This was an exceptive hiring; therefore the sessions were right in holding that no settlement was acquired by service under it. If an intention to except be apparent upon the face of the contract, that constitutes an exceptive hiring: *Rex v. North Nibley*(a). The stipulation that the servant should observe the rules of the factory with regard to the hours of work and attendance, shews clearly that she was not to be under the master's control at all hours, because otherwise such a stipulation was wholly unnecessary. A stipulation for "hours of attendance" on one side, necessa-

(a) 5 T. R. 21.



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rily involves a right to hours of non-attendance on the other, and is never found in hirings of domestic or agricultural servants, who are always hired by the year, the quarter, the month, or the week, without any reference at all to hours. If the pauper observed the rules as to hours of attendance, the master could have no right to her service during the hours of non-attendance. *Rex v. Byker (a)*, where the hiring was held not to be exceptive, is a very different case from this, because there the number of hours was introduced into the agreement merely as a mode of calculating the amount of wages. Secondly, the parol evidence was properly received. The agreement referred to certain rules and regulations as part of the contract; they were not reduced into writing: they could, therefore, be ascertained only by parol testimony. Parol evidence may be received to explain a written instrument, *Rex v. Laindon (b)*, where the question being whether a written contract to learn a trade was a contract of hiring and service or of apprenticeship, parol evidence that the person who was to learn the trade agreed to give a premium, was admitted.

*Merewether*, Serjt. and *Awdry*, contra, were stopped by the Court.

BAYLEY, J.—Where a contract of hiring contains an express exception of any particular time, so that during that time the servant is free from the control of the master, that is not a hiring for a year, and service under it will not confer a settlement. We must look at the contract itself, and all the terms of it, to see whether it was of that character, and what the real bargain was in this case. The contract was in writing, and one of the stipulations was, that the servant should observe all the rules of the factory with regard to the hours of attendance and of work. Now the law implies in every contract of hiring an undertaking by the servant to work at all reasonable hours when re-

(a) 3 D. & R. 330; 2 B. & C. 114.

(b) 8 T. R. 379.

quired. In factories, the ordinary hours of working are, generally speaking, twelve hours a day; but it by no means follows from thence that the master may not on extraordinary occasions require his servants to work at other hours: and whether he does so or not, the relation of master and servant will equally subsist during the whole of the day. It does not appear with any precision, in this case, what the rules of the factory were with regard to the hours of work. But suppose one of them, at the time of making the agreement, to have been, that the servant should work twelve hours a day, still, no minimum being mentioned, and the rules being variable at the pleasure of the master, who did in fact occasionally vary them, a stipulation that the servant should observe all the rules of the factory with regard to the hours of work, would not entitle the servant to say that the master should not require her to work during any reasonable hours. Such a stipulation does not necessarily imply that the servant is not to work beyond certain hours. The true meaning of this agreement, therefore, seems to me to be, that the relation of master and servant should subsist during the whole of the day; and I think that there is no express exception in the contract, and no remission of the service beyond that which the law implies in every contract of hiring. I am, therefore, of opinion that the order of sessions must be quashed.

LITTLEDALE, J.—I am of the same opinion. In order to constitute a yearly hiring the contract must be such that the relation of master and servant will subsist during the whole of the year, and during the whole of every day in the year. That is generally so, as a matter of course, in the case of domestic servants; but in the case of servants employed in factories it is frequently not so, for there the contract often is, that the servant shall work so many hours in the day. This, though the hiring is in terms for a year, has in many cases been decided to be an exceptive hiring; and I think that the law in that respect has been carried to

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the utmost length. It seems to me, that unless by the terms of such a contract there is an express exception, which must necessarily prevent the relation of master and servant from subsisting during the whole of the year, or during the whole of every day in the year for which the contract is made, it is a yearly hiring. Here it was part of the contract that the servant should observe the rules of the factory with regard to the hours of work. That is a stipulation which the law implies in every contract of hiring, and it is impossible from thence to infer that there was an exception of any period of time during which the relation of master and servant was not to subsist.

PARKE, J.—I am also of the same opinion. I have no doubt that what passed by parol between the pauper and the foreman, at the time of making the bargain, was not admissible evidence to explain what the bargain was. As to the supposed exception in the agreement, the stipulation that the servant will obey the rules of the factory, is really no more than a stipulation to obey the orders of her master, and that the law implies in every contract of hiring.

Order of Sessions quashed (a).

(a) *Vide Rex v. Birmingham*, post 691.

—◆—  
The KING v. The Inhabitants of YARWELL.

Relief given by one parish to a pauper residing in another, is *prima facie* evidence of his being settled in the relieving parish; but though the sessions may properly act upon such evidence, they are not bound to do so.

TWO justices, by their order, removed *Thomas Ireson*, his wife, and their children, from the parish of Yarwell, in the county of Northampton, to the parish of Stibbington, in the county of Huntingdon; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The respondents proved, by the pauper and his wife, that the appellants had, about twenty-eight or twenty-nine years ago, and at three or four times subsequently, the last being ten years ago, relieved the pauper and his family

while they were residing in the respondent parish. When they wanted relief, they applied to the parish officers of the appellant parish for work, and as they could not find it for them, they allowed the family twelve shillings a week. It was the pauper's wife who applied for relief upon all those occasions except one, when the application was made by the pauper himself. He had been once examined by the appellants, and stated that he had been an apprentice in their parish. The appellants also, within the last six years, and while the pauper was resident in the respondent parish, paid the expenses of his wife's confinement in a lunatic asylum at Peterborough.

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*Campbell* and *Miller*, in support of the order of sessions. Upon this evidence the sessions would have been warranted in inferring a settlement in the appellant parish, but they were not bound to do so. Relief is only evidence of the opinion of the parish officers that the pauper is settled in the relieving parish. That opinion may prove erroneous, and if so, they are not concluded by acts done under its influence. The respondents might have proved the fact of a settlement acquired in the appellant parish, instead of which they chose to rest their case upon presumptive evidence only. That evidence did not convince the sessions, and they were at liberty to reject the presumption suggested to them. The leading cases upon this subject are, *Rex v. Stanley-cum-Wrenthorpe* (a), and *Rex v. Edwinstowe* (b), but they only shew that the sessions *may* infer a settlement from evidence of relief, not that they are bound to do so.

*Humfrey*, *contra*. The sessions were clearly wrong. There were *no* premises to warrant the conclusion which they drew. The only rational conclusion resulting from the evidence was, that the pauper was settled in the parish of Yarwell. Such evidence, unexplained, has always been deemed sufficient, at least as a *prima facie* case, throwing

(a) 15 East, 350.

(b) 8 B. & C. 671.

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the onus upon the opposite party. He cited *Rex v. Wakefield* (a).

BAYLEY, J.—The sessions have sent a case for our consideration, but they have not thought proper to state what question they wished us to answer. They have stated a strong *primâ facie* case, from which they were certainly free to draw the conclusion that the pauper was settled in the parish of Stibbington; but they were as certainly not bound to do so. It was a question simply and purely for them. The pauper was examined as a witness, and he might have been interrogated upon the fact whether he had ever gained a settlement in the appellant parish, by apprenticeship or otherwise, or whether there were reasonable grounds for concluding that he had done so. Finding that he was not so interrogated, the sessions may have thought it improper to act on mere presumptive evidence of a settlement, when the respondents might have proved the fact of a settlement acquired in the appellant parish. At any rate it was a question for them, and we are not at liberty to disturb their finding.

LITLEDALE, J.—I am entirely of the same opinion.

PARKE, J.—If the sessions had asked us whether there was *primâ facie* evidence of a settlement in the appellant parish, I, for one, should have answered that there was, and that they might properly have acted upon it. If they had asked whether they were bound to do so, I should have answered that they were not.

Order of Sessions confirmed.

(a) 5 East, 335; 1 Smith, 512.



## EARLY v. GARRETT and LANKESTER.

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**ASSUMPSIT**, for money had and received. Plea, the general issue. At the trial before *Littledale*, J., at the Hants Lent assizes, 1829, the case was this:—The action was brought for 111*l.*, the purchase-money of a piece of land, paid by the plaintiff to the defendants. The land was originally part of the glebe of the rectory of St. Mary, Southampton, and had been taken by a canal company under an act of parliament passed in 1795. The rector, Dr. *North*, did not receive the purchase-money or execute any conveyance of the land, but in 1799 he granted a lease of that and other land to one *Fox* for 99 years, if he, Dr. *North*, should so long continue rector. The canal was abandoned, and in 1813 *Fox* gave up his lease to his son, who held the land till 1823, when he let one *Cox* into possession, under an agreement to pay 4*l.* rent the first year, and 5*l.* afterwards, with a power of re-entry in default of payment. The agreement recited that the land was held under lease from Dr. *North*. *Cox* paid rent to *Fox* during two years. *Cox* built a house upon the land, and in 1825 agreed to sell the property to one *Coward* for 60*l.*, and on the 2d of April in that year a feoffment was executed, and livery of seisin given, and afterwards a fine was levied. *Coward* afterwards became bankrupt. The defendants were his assignees. The plaintiff owing money to the defendant *Lankester*, proposed to sell him a freehold estate, which *Lankester* agreed to buy, provided the plaintiff would buy of him and *Garrett*, the other defendant, the land in question, to which the plaintiff agreed. By agreement of 5th April, 1825, made between the plaintiff and the defendants, reciting that the plaintiff had paid 111*l.* for the land in question, the defendants agreed to convey to the plaintiff, his heirs and assigns, the messuage and tenement therein particularly described; such conveyance to contain the following covenants only on the part of the defendants;

The purchaser of an estate cannot recover back his purchase-money on the ground of a concealment of a defect in the title by the vendor, without proving that such concealment was fraudulent; and the question of fraud is properly one for the jury.

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that is to say, that they had not done or permitted any act whereby the premises were affected in title or otherwise; that all persons claiming under them should do such further acts as might lawfully and reasonably be required by the plaintiff, his heirs and assigns, and at his and their own expense; but so that the defendants, or either of them should not be obliged to enter into any form of covenant whereby they might in any manner warrant the title to the premises or the validity of the commission of bankruptcy against *Coward*, or any proceedings taken under the same; the plaintiff having agreed to accept a conveyance of such right or title as the defendants might have, with all faults and defects, if any. The attorney who prepared this agreement on behalf of both parties deposed, that prior to its execution the defendants produced to him the feoffment, and præcipe, and concord of fine, and stated that there were no other documents except the proceedings under *Coward's* commission,—that the plaintiff then inquired of the defendants whether any rent had ever been paid—and that the defendants replied that no rent had ever been paid, either by *Coward*, or by any person under whom he claimed. On the 28th May, 1828, *Fox*, not having received any rent for three years, demanded possession, which being refused, he brought ejectment, obtained judgment, and executed a writ of possession. Upon this evidence it was contended for the plaintiff, that the consideration for which he had paid the purchase-money had failed, and that he was entitled to recover back the amount. The learned judge told the jury that if the defendants knew at the time of executing the agreement that rent had been paid to *Fox*, their suppression of that fact was fraudulent, and the plaintiff was entitled to recover; but that if the defendants really believed that no rent had ever been paid to *Fox*, the suppression was not fraudulent, and they were not liable: and he directed them to find for the plaintiff, if they thought that the defendants knew that rent had been paid to *Fox*, if otherwise, for the defendants. The jury found for the

defendants. A rule nisi for a new trial having afterwards been granted,

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*C. F. Williams* and *Maret* now shewed cause. Where the purchase-money of an estate has been paid, and a conveyance executed, and the purchaser is ousted by a title to which the covenants between him and the vendor do not extend, he cannot recover back the purchase-money. Where the defect does not appear upon the title deeds, and the vendor knows of the defect but suppresses it from the purchaser, the suppression is fraudulent, and the purchaser may recover back the purchase-money. But in an action brought for that purpose it would be necessary to allege and to prove that the vendor knew of the defect and fraudulently suppressed it. In this case the jury have negatived fraud, for they found, in effect, that the defendants did not know that rent had ever been paid to *For*.

*Follett*, (*E. Lawes*, Serjt., was with him,) contrà. The plaintiff is entitled to recover. The language of the agreement between the parties clearly shews that the defendants knew there was *some* defect in the title. Then they were bound to disclose that fact, and their concealment of it was a fraud. It is not necessary, to constitute fraud in such a case, that a direct falsehood should be uttered; the suppression of a fact within the knowledge of the party is sufficient. In *Cripps v. Reade* (*a*) a lease was sold to the plaintiff by the defendant as administrator, without any regular assignment or other conveyance; but at the time of sale the defendant said that the premises were his property to do as he liked with, and if any thing happened, he would see the plaintiff righted. Afterwards, the defendant's letters of administration were repealed, and the plaintiff was turned out of possession by a recovery in ejectment at the suit of the new administrator; whereupon the plaintiff brought an action for money had and received against the

(*a*) 6 T. R. 606.



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defendant to recover the consideration paid for the lease. And it was holden that it would well lie, Lord *Kenyon* observing that he did not wish to disturb the rule of caveat emptor adopted in *Bree v. Holbeach* (a) and other cases, where a regular conveyance was made, to which other covenants ought not to be added; for in general the seller covenanted for his own acts and those of his ancestors only, in which respect the case of a mortgagee differed, as a mortgagor covenanted that, at all events, he had a good title; but here the whole passed by parol, and it proceeded upon a misapprehension by both parties that the defendant was the legal administrator of the lessee, though it turned out afterwards that he was not. As, therefore, the money was paid by mistake, he thought that an action for money had and received would lie to recover it back. So here, if there was no direct fraud or misrepresentation, there was, at all events, a misapprehension on the part of the defendants; and even in that view of the case, the plaintiff is entitled to recover back his purchase-money.

BAYLEY, J.—It was left to the jury, as a question of fact, whether the defendants really believed that no rent had ever been paid to *Fox*; and the jury found that the defendants did so believe. That being so, their statement that no rent ever had been paid, though false in fact, was not fraudulent. I make no distinction between an active and a passive communication; for a fraudulent concealment is as bad as a wilful misrepresentation. A fraudulent concealment by the seller of a fact which he ought to communicate, would undoubtedly vitiate the sale; but in order to have that effect the concealment must be fraudulent. Here the jury have found that the defendants had no knowledge that rent had been paid to *Fox*; there was, therefore, no fraudulent concealment, and the plaintiff is not entitled to recover. It follows that the verdict is right, and that the rule for a new trial must be discharged.

LITLEDALE, J.—In *Springwell v. Allen* (b), which was

(a) Doug. 654.

(b) 2 East, 448, n.

an action on the case for selling a horse as the defendant's own, when in truth it was the horse of another, it appeared that the defendant bought the horse in Smithfield, but had not taken the usual precaution of having the horse legally tolled; yet as the plaintiff could not prove that the defendant knew that the horse belonged to another, the plaintiff was nonsuited; for the scienter, or fraud, is the gist of the action where there is *not* a warranty; where there is a warranty, the party takes upon himself the knowledge of the title to the horse, and of his qualities. I thought that was an analogous case to the present, and, therefore, left it to the jury to say whether the concealment was fraudulent or not.

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PARKE, J.—It is established by the authorities that the purchaser cannot recover, unless he proves fraud on the part of the seller. Here the plaintiff purchased the land with all faults and defects of title. That being so, I think it was properly a question for the jury whether the concealment was fraudulent or not, and that was, in substance, the question left to them. They have found by their verdict that there was no fraudulent concealment; and I see no ground for disturbing that finding.

Rule discharged.

—◆—  
 The KING v. The Inhabitants of BIRMINGHAM.

TWO justices, by their order, removed *William Stean*, his wife, and their children, from the parish of Birmingham to the township of Atherstone, both in the county of Warwick; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *William Stean*, being settled at Atherstone, and unmarried, went to live with *James Owen*, a button-caster, of Birmingham. After he had been with him some time, *Owen* hired him for a year at 4s. 6d. a week; nothing was said about Sundays. It was a part of the terms of

A pauper was  
 "hired for a  
 year, at 4s. 6d.  
 a week, to  
 work from six  
 in the morning  
 till seven in the  
 evening, and to  
 make as much  
 overwork as he  
 chose:"—  
 Held, an ex-  
 ceptive hiring,  
 service under  
 which con-  
 ferred no  
 settlement.

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hiring that the pauper was to work from six in the morning to seven in the evening, and might make as much overwork as he chose. He received earnest when he was hired. He served his master under this contract for a year, during which he lived in his master's house and boarded himself. He lived there on Sundays as well as week days, and on Sunday morning he used to ask if there was any thing to be done, and if there was, he did it. He made a good deal of money by overwork, but never did any for any one but his master, and was never paid for it but by him: he was allowed 2*d.* an hour for overwork. At the expiration of the first year, he was hired by *Owen* for a second year on the same terms, except that he was to have 5*s.* 6*d.* a week wages, and 4*d.* an hour overwork. He served the whole of the second year. He was then hired for and served a third year upon the same terms, except that he was to have 6*s.* a week wages, and 6*d.* an hour overwork.

*Goulburn*, Serjt., and *Amos*, in support of the order of sessions. This was an exceptive hiring, and the pauper gained no settlement by service under it. Unless the servant is under the control of the master during the whole year, that is, during the whole of every day in the year (*a*), it is not a good hiring for a year. Here he was not so. It was held in *Rex v. North Nibley* (*b*) that a service under a hiring for five years as a colt shearman, to work twelve hours each day, would not give a settlement, because the parties did not stand in the relation of master and servant except for particular hours in the day; the servant was under the master's control during the twelve hours only, and could not be compelled to work at other hours. Here the relation of master and servant continued during thirteen hours a day only; the servant was under the master's control during those hours only, and could not be compelled

(*a*) See the judgment of *Littledale, J.*, in *Rex v. St. John, Devizes*, *ante*, 683.

(*b*) 5 T. R. 21.

to work at other hours. *Rex v. Byker* (a) is distinguishable from the present case, because there time was mentioned merely as the measure of wages; here the pauper was at all events to receive 4s. 6d. a week, and to work from six in the morning till seven in the evening; therefore time was not mentioned as the measure of wages. [*Bayley, J.* Is not *Rex v. Kingswinford* (b) very like the present case?] They are scarcely distinguishable. There a servant agreed by covenant to serve as an artificer for seven years, and that he would not work for any other person, but would continue and be in the service from six in the morning till seven in the evening of each day, except on Sundays. This was held to be a covenant to serve only thirteen hours on working days, and to be his own master on Sundays; for the expression of so many hours is the exclusion of the rest, and, therefore, no settlement can be gained by service under it. And it was thought to make no difference that the servant occasionally worked in the night-time, and often went on errands for his master on Sundays; for where the contract is explicit, it is not how much the servant actually does, but what he has agreed to do, that is to be considered.

*Hill*, contrâ. This was a good hiring for a year, for there is no *express* exception in the contract (c). The control of the master over the servant never ceased throughout the year; and that is the true test. The servant boarded and lodged in the master's house, which is a strong circumstance to shew a yearly hiring. [*Parke, J.* He boarded himself, and lodged in his master's house: but it was no part of the contract that he should lodge there.] The master by the contract claims to have work during thirteen hours a day; but he does not thereby necessarily or expressly exclude any hour, and the mention of time seems rather to have been adopted as a measure of wages. The

(a) 3 D. & R. 330; 2 B. & C. 114.

(b) 4 T. R. 219.

(c) See *Rex v. St. John, Devizes*, ante, 683.

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law would hardly compel a labour of more than thirteen hours a day. The pauper never worked for any other person, and frequently worked on Sundays. In *Rex v. Byker (a)*, the pauper was hired for a year at 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day additional when that time was exceeded, and it was held that this was a conditional and not an exceptive contract, and that the pauper who had served under it for one whole year thereby gained a settlement.

BAYLEY, J.—This is a very different case from *Rex v. Byker*. There the pauper was hired by indenture, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. per day additional when that time was exceeded. A service of more than fourteen hours a day was clearly contemplated there, and the Court thought that the time was mentioned merely as the measure of wages, that the contract did not impose any limit upon what might reasonably be required by the master, and that the relation of master and servant subsisted during the whole twenty-four hours. Here the stipulations are that the servant shall receive fixed wages, that he shall work from six in the morning till seven in the evening, and that he may make as much overwork as he chuses. But he could not have been compelled to make any overwork; he had a right any and every evening to say to his master, "I have worked thirteen hours to day, and I will work no more till to-morrow." This is clearly an exception in the contract, limiting the control of the master over the servant to thirteen hours a day; beyond that period the master had no right to compel work, nor was the servant under any obligation to perform it.

LITLEDALE, J.—I am of the same opinion.

PARKE, J.—I think this is a very clear case of exceptive hiring.

Order of Sessions confirmed.

(a) 3 D. & R. 330; 2 B. & C. 114.

The KING v. The Inhabitants of TAUNTON ST. JAMES.

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TWO justices, by their order, removed *W. G. Palmer*, his wife and children, from the parish of Taunton St. James to the parish of Milverton, both in the county of Somerset; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The pauper, aged about thirty-eight years, lived in the parish of Langford Budville, in Somersetshire, till he was about seven years of age, when he was bound apprentice by the parish officers to Mr. *John Locke*, of that parish, yeoman, and served him in that parish till he, the pauper, was twenty-one years old. The pauper afterwards, at Lady-day, 1811, hired himself as servant in husbandry for a year from that time to Mr. *Thomas Handford* of Milverton; and after serving him three months, having at Christmas preceding volunteered into the local militia, he went out into actual service for three weeks, and then returned to Mr. *Handford's* service till Lady-day, 1812, and then received his wages after deducting for the three weeks he was absent in the militia. The pauper's agreement with Mr. *Handford* was for a year's service, at the wages of 11*l.* and his board and lodging. The pauper did not tell Mr. *Handford*, when he first bargained with him, that he was in the militia; but told him a week or two afterwards; and Mr. *Handford* said it did not signify, for the pauper could, at the end of the year, deduct for the time he was absent.

A local militia-man hired himself to serve for a year, without disclosing to his master the fact that he was in the militia:—Held, that this was not a lawful hiring within 3 *W. & M.* c. 11, s. 7, the servant not being sui juris, or capable of so hiring himself, notwithstanding the provisions of 48 *G.* 3, c. 111, ss. 15 & 24, the local militia act in force at the time.

*Rogers* and *Bere*, in support of the order of sessions. The recent case of *Rex v. Holsworthy* (a) is decisive of the present. There a militia-man hired himself for a year, and served a year under such hiring. It did not appear that at the time of the hiring he told his master that he was a militia-man. It was held that he gained no settlement.

(a) 9 D. & R. 522; 6 B. & C. 283.

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And upon two grounds, both of which apply to the present case; first, that the pauper, at the time of the hiring, was not capable of making a contract, so as to give the master a control over his services during the year; and secondly, that as the pauper did not communicate to his master that he had entered into the militia, the hiring was not conditional, but an absolute hiring for a year (*a*). Here the pauper, at the time of the hiring, did not communicate to his master that he had volunteered into the militia; therefore he entered into an absolute contract, which he was incapable of doing. The fact here, of the pauper's disability being afterwards communicated to the master, cannot alter the case, because the contract was already made; or if it can be considered that a new contract was made at the time of the communication, that was not a contract for a year: *Rex v. Sulgrave* (*b*), *Rex v. Rushall* (*c*). But even if that contract had been sufficient, still there was not a continuing service under it sufficient to confer a settlement. This appears from the judgment of *Bayley, J.* in *Rex v. Holsworthy* (*d*). The other side will probably rely upon the cases of *Rex v. Winchcomb* (*e*), and *Rex v. Westerleigh* (*f*), but they were virtually overruled by the case of *Rex v. Beaulieu* (*g*). The interval which occurred while the pauper was serving in the militia, cannot be considered as dispensed with by the master, for he cannot be said to have dispensed with a service which he could not enforce; and the pauper was compelled to serve in the militia by a power paramount to that of the master. It will, perhaps, be attempted to draw a distinction between liability to serve in the general and liability to serve in the local militia; but the Court will find that no such distinction can be sustained.

(*a*) See the judgment of *Holroyd, J.* 9 D. & R. 327.

(*b*) 2 T. R. 376.

(*c*) 7 East, 471.

(*d*) 9 D. & R. 326.

(*e*) Cald. 94; Doug. 391.

(*f*) Burr. S. C. 753.

(*g*) 3 M. & S. 229.

*Erle and Follett*, *contra*. The contract of hiring entered into in this case is in express terms rendered effectual to confer a settlement by the militia act in force at the time, 48 Geo. 3, c. 111. It is provided by the fifteenth section of that statute, "that no ballot, inrolment, and service under that act, shall extend to make void, or in any manner to affect any indenture of apprenticeship, or contract of service, between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract: and that no service under that act of any apprentice or servant shall be deemed, or construed and taken to be an absence from service, or a breach of any covenant or agreement, as to any service, or absence from service, in any indenture of apprenticeship or contract of service." [*Littledale*, J. I think that clause clearly applies retrospectively to services previously entered into; to contracts existing at the time of the inrolment: not prospectively to contracts made afterwards.] The words used in that section are "any contract," and "any service;" those words, taken in their ordinary sense, must mean *all* contracts and services, whether entered into or existing before or after the inrolment. [*Littledale*, J. Suppose the words "or in any manner to affect" had been omitted, and the only words used had been "to make void any indenture of apprenticeship or contract of service;" would not that section then have been confined to contracts existing at the time of the inrolment?] The words "in any manner to affect" are words of substance, and cannot be rejected. The pauper in this case was a volunteer, but the twenty-fourth section of the act declares, that all persons voluntarily inrolling themselves shall serve in the same manner, and under the same regulations, and subject to the same provisions, as if they had been balloted for under the act. That shews that the statute was intended to have a general, and indeed an universal operation. Subsequent militia acts passed which made no alteration in the law at all affecting this question; and they were all repealed by the 52 Geo. 3, c.

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68, the sixty-third section of which contains the original provision as to service. [*Bayley, J.* But the words of that section, by reference to the sixtieth section, are clearly confined to contracts existing at the time of the enrolment. That is a legislative exposition of their meaning in the prior statute, for the same words applied to the same subject-matter in statutes in *pari materiâ*, ought to receive the same construction.] The words of the fifteenth section of the 48 *Geo. 3*, c. 111, must be construed according to their plain and ordinary meaning, and not by reference to the meaning in which they are used in another statute subsequently made. But, independently of the statute, there is a sufficient hiring and service here to confer a settlement. *Rex v. Westerleigh*(a), and *Rex v. Winchcomb*(b), are extremely strong authorities; the former was much considered in the latter; and neither of them has ever been overruled. [*Bayley, J.* But in both those cases the fact of the servant being in the militia was communicated to the master at the time of the hiring. That is the important distinction between those cases and the present.] In this case the fact was communicated a week or two after the first hiring, and what then took place constituted a second valid hiring. [*Bayley, J.* If there was a hiring for a year then, there clearly was not a service for a year under it. *Parke, J.* There was not a hiring for a year then. The second hiring, if any, was for a period less than a year. A hiring cannot be retrospective.]

BAYLEY, J.—I consider this case as depending entirely upon the construction of the fifteenth section of the statute 48 *Geo. 3*, c. 111. By the statute 3 *W. & M.* c. 11, s. 7, the party claiming a settlement by hiring and service must have been lawfully hired for a year, and have served a year. With reference to the meaning of the phrase “lawfully hired,” it has been long established that the party hiring himself must be *sui juris*—must be capable of rendering

(a) Burr. S. C. 753.

(b) Cald. 94; Doug. 391.

that service which he contracts to render. Upon this principle it has been decided that neither a deserter from the King's service, *Rex v. Norton-juxta-Kempsey*(a), nor an invalided soldier having leave of absence, *Rex v. Beau-lieu*(b), nor a militia-man, *Rex v. Holsworthy*(c), can lawfully hire himself for a year so as to acquire a settlement. In the case last mentioned a person who was inrolled as a substitute in the militia, hired himself for a year, and served a year under such hiring. It did not appear that at the time of the hiring he told his master that he was in the militia. It was held, that he acquired no settlement. Now the decision in that case must govern our judgment in the present, unless it is distinguishable from it by reason of the provision contained in the statute 48 Geo. 3, c. 111, s. 15. That section provides, "that no ballot, inrolment, and service under that act, shall extend to make void, or in any manner to affect any indenture of apprenticeship, or contract of service between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract; and no service under that act of any apprentice or servant shall be deemed, or construed, or taken to be an absence from service, or a breach of any covenant or agreement as to any service, or absence from service, in any indenture of apprenticeship or contract of service, any thing contained in any act or acts of parliament, or law or laws, or deed or indenture of apprenticeship, or contract of service, to the contrary notwithstanding." Those words, taken as they there stand, *may*, undoubtedly, apply to *all* indentures of apprenticeship or contracts of service, both those existing at the time of the ballot or inrolment, and those made afterwards. The question is, whether they *do* apply to *all* contracts whatever, or whether they are confined to such as were in existence at the time of the ballot or inrolment. Now for the purpose of ascertaining the sense in which they are

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(a) 9 East, 207.

(b) 3 M. &amp; S. 229.

(c) 9 D. &amp; R. 322; 6 B. &amp; C. 283.

189. Now if the act of parliament we have just looked at, the act of parliament relating to the same subject-matter, and the words are the same words used in a limited and restricted sense in some other act, ought to construe them in the same sense in this, or to at least approximate the if construction that the same words in two statutes in parliament should receive the same meaning. No such words are to be found in the preceding statute of 32 Geo. 3, s. 63, but they are to be found in the subsequent section of the succeeding statute of 48 Geo. 3, c. 111, and if there are seen in the sense limited and restricted to contracts existing at the time of the making of the instrument, they ought to receive the same construction in the first section of the 48 Geo. 3, c. 111. Now these words in 32 Geo. 3, c. 68, s. 63, are clearly confined to contracts existing at the time of the making of the instrument. The sixtieth section enacts, that the instrument of servants shall not vacate or rescind contracts between master and servant, unless the local militia shall be called out, or the person involved shall leave the service for the purpose of being trained. That must apply exclusively to contracts existing at the time of the enrolment, because contracts not in existence could not be vacated or rescinded. The sixty-third section is a transcript of the first section of the 48 Geo. 3, c. 111. It begins "Provided always," and then proceeds in the same words. Now a proviso in an act of parliament is something engrafted on and referring to a preceding enactment, and the proviso in the sixty-third section evidently refers to the enactment in the sixtieth section, which being limited and restricted to contracts existing at the time of the enrolment, the proviso also must be read as limited and restricted in the same manner. Such being the fair meaning of these words in the 32 Geo. 3, c. 68, s. 63, they ought to receive the same construction in the 48 Geo. 3, c. 111, s. 15, and giving them that construction, there is nothing in that statute enabling a person in the situation of this pauper to stay himself for a year so as to acquire a settlement. The

clause ends with a proviso as to service; that may make the service good; but assuming the service in this case to have been sufficient, I should come to the same conclusion, because my opinion is founded, not on any defect in the service, but on the want of a capacity to contract. I think the pauper was not at the time of the hiring *sui juris*—not capable of contracting to render the service which he did contract to render, and therefore that he gained no settlement by the hiring and service in the parish of Milverton. I am therefore of opinion that the sessions came to a right decision in this case, and that their order quashing the order of removal to Milverton ought to be confirmed.

LITLEDALE, J.—I am of the same opinion. The concealment of the important fact of the pauper's having volunteered into the militia destroyed the hiring. It is a general principle both in law and morals, that when a man enters into a contract, he ought either to be able to perform it, or to inform the person with whom he contracts of his disability. It is contended that the fifteenth section of the 48 *Geo. 3*, c. 111, extends not only to contracts existing at the time of the enrolment, but to contracts subsequently made. It seems to me that the words "make void," *ex vi termini*, apply to contracts in *esse*; but supposing that to be doubtful, still calling in aid the principle to which I have alluded, and which ought not to be lost sight of in construing words of doubtful import in an act of parliament, it is clear that this section must be read as extending only to contracts existing at the time of the enrolment: and it follows that in order to gain a settlement by a contract of hiring made after enrolment, a party must disclose his disability to the person with whom he contracts. This would be my view of the question, even taking the 48 *Geo. 3*, c. 111, s. 15, as standing alone; but coupling that section with the subsequent act of 52 *Geo. 3*, c. 68, s. 63, and construing the one with reference to the other, which, for the reasons so fully stated by my brother Bayley, I

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think we ought to do, I am decidedly of opinion that there was no lawful hiring in this case, and therefore that no settlement was acquired by the service under it.

PARKE, J.—Was there a lawful hiring for a year at Lady day, 1811? That is really the only question in this case. There may have been a sufficient service; I incline to think that there was: but there clearly was no lawful hiring for a year. Assuming that the subsequent conversation between the master and the servant amounted to a second hiring, that was not a hiring for a year, but for a period less than a year. Then as to the first hiring—that was for a year; but to constitute a lawful hiring, the party must have ability to contract for the period during which he agrees to serve. *Rex v. Holsworthy* (a) shews, that where a party is under a disability, he may, by disclosing it to the person with whom he contracts, make a conditional hiring; but that if he conceal it, he makes an absolute contract which he is incapable of making, and which is, therefore, not a lawful hiring. Here the disability existed, but was not disclosed. Then does the 48 *Geo. 3*, c. 111, remove this disability? It cannot be supposed that the legislature intended to enable a local militia-man to make an absolute contract of hiring, for that would be to enable him by law to commit a fraud; for the master would contract in the belief that the servant had power to bind himself for a year, the latter knowing at the time that he had not. But the legislature might well intend to provide that a contract made *bonâ fide* and while the party was *sui juris*, should not be avoided by his being subsequently drawn for the militia. The statute does not in express terms enact that a militia-man shall be *sui juris*, for the fifteenth section is clearly confined to contracts existing at the time of the ballot or enrolment. Coupling that section with the twenty-fourth, I have some doubt whether a volunteer and a balloted man stand in precisely the same situation. But supposing they do, all

(a) 9 D. & R. 322; 6 B. & C. 283.

that the legislature says is, that a master who contracts with a free man shall take his chance of a ballot, and shall not contract against that chance; but there is no provision that a volunteer or a balloted man shall have the same capacity to contract as a free man. No power, therefore, is given to such persons to enter into an absolute contract of hiring and service for a year. Here the pauper did enter into such a contract when he had no power to do so: therefore that was not a lawful hiring, and no settlement was gained by service under it.

Order of Sessions confirmed.

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The KING v. The Inhabitants of TIPTON.

TWO justices, by their order, removed *James Smith* and his wife and children from the parish of Birmingham, in the county of Warwick, to the parish of Tipton, in the county of Stafford; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

*James Smith*, the pauper, gained a settlement by hiring and service in the parish of Tipton, in the year 1820. About two years afterwards he entered into the following agreement, in writing, with *John Thompson* of King's Morton, in the county of Worcester:—

An agreement made the 4th day of October, 1822, between *John Thompson*, of King's Morton, in the county of Worcester, plumber, glazier and painter, of the one part, and *James Smith*, aged about twenty-eight years, one of the sons of *Jacob Smith*, of Solihull, in the county of Warwick, of the other part. The said *James Smith* and *Jacob Smith* do severally promise and agree that the said *James Smith* shall and will serve the said *John Thompson* as an *articled servant*, for the term of four years, to commence from the 4th of

An adult contracts to serve a plumber as an articled servant for four years, to learn his trade, at weekly wages; to be considered as an out-apprentice; to do gardening or any other work his master set him about; and, when ill, not to receive wages; the master agreeing to teach him his trade. This is not a contract of hiring and service, but an imperfect contract of apprenticeship, service under which does not confer a settlement.

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October, 1822, *to learn his art or trade* of plumber, glazier and painter, at the wages of 6s. a week for the first year, 7s. a week for the second year, 8s. a week for the third year, and 9s. a week for the fourth year; and it is agreed that the said *James Smith* shall be considered as an *out apprentice*; and the said *James Smith* and *Jacob Smith* shall and will find and provide for the said *James Smith* sufficient meat, drink, washing, lodging and clothing, and all other necessities, during the said term; and the said *James Smith* shall and will do and perform gardening or any other work his master shall set him about during the said term. And in case the said *James Smith* shall be ill and unable to work, or shall absent himself from his master's business, or lose any time during the said term, that the said master shall not pay him any wages during the time he shall be ill or lose any time as aforesaid. And that the said *James Smith* shall and will faithfully serve his said master in all lawful business during the said term, and shall and will behave himself honestly, orderly and obediently, during the said term; and the said *John Thompson* doth promise and agree that he will *teach and instruct* the said *James Smith* in the art and mystery of a plumber, glazier and painter, during the said term, in the best manner that he can, and that he will pay the wages above set forth to the said *James Smith* during the said term; and the said parties do hereby severally bind themselves for the true and faithful performance of all the agreements above set forth, at all times during the said term."

This agreement was signed by the parties, and attested by two witnesses, but it was not sealed or stamped. The pauper served *Tompson* under this agreement for more than a year, and boarded and lodged during that time at *Tompson's* house, in the parish of King's Morton.

*Amos and Hill*, in support of the order of sessions. The effect of the decision of the sessions is, that they were not

convinced that the parties contemplated a contract of hiring and service. The question is, whether they should have been so convinced under the circumstances; the answer is, no; for the contract is clearly an imperfect contract of apprenticeship, and not a contract of hiring and service. The rule laid down in *Rex v. St. Margaret's, King's Lynn* (a), and recognised in *Rex v. Combe* (b), is this:—"Where it appears, from all the circumstances, that the parties, at the time of making the contract, intended to create the relation of master and apprentice, the contract must be construed as one of apprenticeship; and then, if it is a defective apprenticeship, no settlement can be gained by service under it. Where, on the other hand, it appears that the parties intended to create the relation of master and servant, the contract must be construed as one of hiring and service, and a settlement will be gained by service under it" (c). In this case, as in the cases cited, there are circumstances, some tending to the inference that an apprenticeship, others that a hiring and service, was intended; and the question will be, which, upon the whole, appears to have been the paramount, and which the subordinate object of the parties. The fact that no premium was paid will be relied upon by the other side; but though "the payment of a premium is cogent evidence to shew that an apprenticeship was intended, it is not conclusive; and much less is the absence of a premium evidence to shew that a hiring and service was intended" (d). Another point made on the other side will be, that the master agreed to pay weekly wages; but that does not justify the inference that a hiring and service was intended, for the payment and receipt of wages are not inconsistent with the relation of master and apprentice: *Rex v. Rainham* (e). The pauper in this case was to "serve as an artied *servant*," but he was also to be "considered as an out *apprentice*;" and it must be remembered that an

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(a) 9 D. & R. 160; 6 B. & C. 97.

(d) Per *Bayley*, J. 9 D. & R. 163.

(b) *Ante*, ii. 30; 8 B. & C. 82.

(e) 1 East, 531.

(c) Per *Bayley*, J. 9 D. & R. 163.



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apprentice is a servant. By holding this agreement to constitute an imperfect contract of apprenticeship, effect will be given to both those words, servant and apprentice; and effect should be given, if possible, to every word in an agreement. Though the pauper was to serve as an articulated servant, it was for a purpose strongly indicative of an apprenticeship, namely, "to *learn* the art or trade of a plumber;" and in a subsequent part of the agreement the master undertakes "to *teach and instruct* the pauper in the art and mystery of a plumber." The father of the pauper being a party to the agreement, is also a circumstance leading to the inference of an apprenticeship rather than a hiring and service. At all events, the intention of the parties being doubtful, and the question of intention being one of fact, the Court will not disturb the finding of the sessions upon it.

*Waddington*, contra. The paramount intention of the parties, as appearing from the terms of the agreement taken altogether, seems to have been to create the relation of master and servant, and not that of master and apprentice. The question of intention is not a question of fact, but of law, and is to be decided upon the legal construction and effect of the agreement. *Rex v. Rainham* (a) is no authority on one side or the other, as there it was unnecessary to decide whether the contract was one of apprenticeship or of service, because the pauper having served under it for more than a year, gained a settlement either as an apprentice or as a hired servant. Here it is twice stated in the agreement that the pauper is to *serve*; he is called a *servant*; he is to do gardening or any other work his master may set him about; he is to receive wages, and no premium is paid with him. All these are indicia of service. No contract in which the word *servant* has been used has ever yet been held to be a contract of apprenticeship. *Rex v. Coltishall* (b) is very like the present case.

(a) 1 East, 531.

(b) 5 T. R. 193.

There *A.* clubbed with *B.* for three years, (which signifies one person contracting to serve another for the purpose of being taught some art or trade,) and also agreed to do any work that *B.* set him about; and it was held that *A.* gained a settlement by serving *B.* under that contract for a year. Lord *Kenyon* there said, that the stipulation that the pauper was to do any work his master set him about, was decisive to shew that he must be considered a *hired servant*. That case was recognised and acted upon in *Rex v. Martham* (a), which is still more like the present. There *A.* clubbed with *B.* for three years, at weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionate deduction of wages; and it was held that he gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made. The statement in this case, that the pauper shall be considered as an out-apprentice, is outweighed by his agreement to serve as an articulated servant. There are many cases shewing that mutual agreements to learn and to teach a trade do not, per se, constitute an apprenticeship. *Rex v. St. Margaret's, King's Lynn* (b), and *Rex v. Combe* (c), both differ from this case, because there no wages were paid; in the former also it was intended to have indentures, but none were executed *on account of the poverty of the mother*; and in the latter it was intended to hire the pauper out to service, but it was afterwards thought better that he should go to learn a trade, *instead of going to service*. [*Bayley, J.* Are there any cases where the master expressly contracted to teach, and yet the contract was held to be a contract of service?] *Rex v. Little Bolton* (d), and *Rex v. Eccleston* (e), are cases precisely of that description.

BAYLEY, J.—We despair of reconciling all the cases

(a) 1 East, 239.

(d) Cald. 367.

(b) 9 D. & R. 160; 6 B. & C. 97.

(e) 2 East, 298.

(c) *Ante*, ii. 30; 8 B. & C. 82.

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68, the sixty-third section of which contains the original provision as to service. [*Bayley*, J. But the words of that section, by reference to the sixtieth section, are clearly confined to contracts existing at the time of the enrolment. That is a legislative exposition of their meaning in the prior statute, for the same words applied to the same subject-matter in statutes in *pari materia*, ought to receive the same construction.] The words of the fifteenth section of the 48 Geo. 3, c. 111, must be construed according to their plain and ordinary meaning, and not by reference to the meaning in which they are used in another statute subsequently made. But, independently of the statute, there is a sufficient hiring and service here to confer a settlement. *Rex v. Westerleigh*(a), and *Rex v. Winchcomb*(b), are extremely strong authorities; the former was much considered in the latter; and neither of them has ever been overruled. [*Bayley*, J. But in both those cases the fact of the servant being in the militia was communicated to the master at the time of the hiring. That is the important distinction between those cases and the present.] In this case the fact was communicated a week or two after the first hiring, and what then took place constituted a second valid hiring. [*Bayley*, J. If there was a hiring for a year then, there clearly was not a service for a year under it. *Parke*, J. There was not a hiring for a year then. The second hiring, if any, was for a period less than a year. A hiring cannot be retrospective.]

BAYLEY, J.—I consider this case as depending entirely upon the construction of the fifteenth section of the statute 48 Geo. 3, c. 111. By the statute 3 W. & M. c. 11, s. 7, the party claiming a settlement by hiring and service must have been lawfully hired for a year, and have served a year. With reference to the meaning of the phrase “lawfully hired,” it has been long established that the party hiring himself must be *sui juris*—must be capable of rendering

(a) Burr. S. C. 753.

(b) Cald. 94; Doug. 391.

that service which he contracts to render. Upon this principle it has been decided that neither a deserter from the King's service, *Rex v. Norton-juxta-Kempsey*(a), nor an invalided soldier having leave of absence, *Rex v. Beau-lieu*(b), nor a militia-man, *Rex v. Holsworthy*(c), can lawfully hire himself for a year so as to acquire a settlement. In the case last mentioned a person who was inrolled as a substitute in the militia, hired himself for a year, and served a year under such hiring. It did not appear that at the time of the hiring he told his master that he was in the militia. It was held, that he acquired no settlement. Now the decision in that case must govern our judgment in the present, unless it is distinguishable from it by reason of the provision contained in the statute 48 Geo. 3, c. 111, s. 15. That section provides, "that no ballot, inrolment, and service under that act, shall extend to make void, or in any manner to affect any indenture of apprenticeship, or contract of service between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract; and no service under that act of any apprentice or servant shall be deemed, or construed, or taken to be an absence from service, or a breach of any covenant or agreement as to any service, or absence from service, in any indenture of apprenticeship or contract of service, any thing contained in any act or acts of parliament, or law or laws, or deed or indenture of apprenticeship, or contract of service, to the contrary notwithstanding." Those words, taken as they there stand, *may*, undoubtedly, apply to *all* indentures of apprenticeship or contracts of service, both those existing at the time of the ballot or inrolment, and those made afterwards. The question is, whether they *do* apply to *all* contracts whatever, or whether they are confined to such as were in existence at the time of the ballot or inrolment. Now for the purpose of ascertaining the sense in which they are

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(a) 9 East, 207.

(b) 3 M. &amp; S. 229.

(c) 9 D. &amp; R. 322; 6 B. &amp; C. 283.

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13 & 14 *Car.* 2, c. 12, the power of removal was confined to persons coming to settle upon tenements under the yearly value of 10*l.*; so that down to the passing of the 59 *Geo.* 3, c. 50, all persons coming to settle upon tenements above the yearly value of 10*l.* acquired settlements. The latter statute did not alter the law with respect to the value of tenements, but required in addition that they should be *bonâ fide* hired for the sum of 10*l.* by the year. This appears from the 6 *Geo.* 4, c. 57, which, after reciting that the settlement of the poor had been made in some instances to depend upon the annual value of tenements, and that the ascertaining such value had given rise to very expensive litigation, repeals the 59 *Geo.* 3, c. 50, and enacts, among other things, that it shall not be necessary to prove the value of such tenement. That amounts to a legislative exposition of the meaning of the 59 *Geo.* 3, c. 50, namely, that it did not alter the law as to the value of the tenement; proof, therefore, that the tenement in this case was of the yearly value of 10*l.*, was necessary, and that fact having been disproved, no settlement was acquired.

BAYLEY, J.—The statute 59 *Geo.* 3, c. 50, requires that the tenement shall be *bonâ fide* hired at and for the sum of 10*l.* by the year. I think that does not mean that the tenement shall be worth 10*l.* by the year, but that it leaves the actual value immaterial, provided the tenement is *bonâ fide* hired at 10*l.* by the year. The proviso in the 6 *Geo.* 4, c. 57, “that it shall not be necessary to prove the actual value of the tenement,” was, I apprehend, introduced merely for greater caution.

LITLEDAL, J.—I am of the same opinion.

PARKE, J.—One great cause of the disputes and controversies mentioned in the preamble of the 59 *Geo.* 3, c. 50, was the necessity of proving the value of the tenement. The object of that statute was to prevent litigation, and it

requires that the tenement shall be bonâ fide hired at the sum of 10*l.* by the year. Generally speaking, the rent agreed upon between landlord and tenant is the best criterion of value, and I think the legislature intended to dispense with any other evidence of value. Where it appears that the value of the tenement is considerably less than 10*l.* a year, that is evidence to shew that it was not bonâ fide hired at that sum. Where it is bonâ fide hired at that sum, I think that is sufficient.

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BY a rate made in February, 1826, for the relief of the poor of the hamlet of Lower Mitton, in the parish of Kidderminster, in the county of Worcester, the Staffordshire and Worcestershire Canal Company were rated for their basins, towing-paths, and that part of their canal, and the locks thereon, lying within Lower Mitton, and for the tolls and dues arising therefrom due at Lower Mitton, on 4000*l.*, at the sum of 200*l.* On hearing an appeal against the rate the sessions amended the rate by reducing the sum for which the company were rated from 4000*l.* to 706*l.* 9*s.* 6*d.*, subject, as to the lock duties hereinafter described, to the opinion of this Court upon the following case:—

The tolls payable for passing through locks belonging to a canal company, are rateable to the poor *wholly* in the parish in which the locks are situate.

By an act of 6 *Geo.* 3, the company are authorised to take rates and duties for tonnage and wharfage for all goods conveyed on the canal, not exceeding three halfpence per mile for every ton, and so in proportion for any greater or less quantity than a ton. By another act of 10 *Geo.* 3, the company are authorised to take tonnage proportionably for any distance less than a mile which any commodities shall be conveyed on the canal, *and the boats, barges, and other vessels passing through the two locks* erected between the river Severn and the canal basin, are to pay a toll or lock due of one penny per ton, in lieu of the tonnage of three

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halfpence per mile fixed by the previous act of 6 *Geo.* 3. The canal basin is twelve feet below the level of the canal, and twenty-four feet above that of the Severn, with which it communicates through the two locks mentioned in this enactment. These locks receive the necessary supply of water from the basin, which is itself supplied partly from the canal and partly from the Severn. The supply from the Severn is raised by means of a steam-engine, which is used for no other purpose than to raise this supply. The lock dues received by the company for boats, barges, and other vessels passing through these locks, from November, 1825, to November, 1826, amounted to 350*l.* The locks, basin, and steam-engine, are locally situated in the hamlet of Lower Mitton. The boats, barges, and other vessels, which pass through these locks, for the most part bring into the basin cargoes to be taken up the canal, and which in fact are subsequently so taken, or take out of the basin cargoes which have been brought down the canal; and the toll of one penny per ton is due and paid for merely passing through the two locks from the canal basin to the Severn, and vice versâ. The barges that pass from the Severn into the canal basin cannot navigate the canal, and the boats that come down the canal rarely pass into the Severn, but transship their cargoes in the basin into the Severn barges; and the toll for passing the two locks is in both cases paid for the barges and boats. If a canal boat pass into the Severn from the basin, it pays the lock dues in addition to the milage dues paid for carrying goods along the canal. The lock dues paid as above stated are the only profits which the company derive from the Severn locks.

The Court of Quarter Sessions were of opinion that the profits of the locks were not ratable in Lower Mitton only, but that they should be divided among all the parishes through which the canal runs, in proportion to the length of canal in each parish, in the same manner as the general profits of the canal were divided.

If this Court shall be of opinion that the sessions were

wrong, the rate is to be amended by increasing the amount at which the company are rated from 706*l.* 9*s.* 6*d.* to 1056*l.* 9*s.* 6*d.*

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*M'Mahon, Whateley, and Holroyd*, in support of the order of sessions. If the milage dues of three halfpence per ton are, for the purpose of rating, properly divided among all the parishes through which the canal runs, it will follow that the lock dues of one penny per ton should be divided in the same manner; for there is really no distinction between them; the latter are merely substituted in lieu of the former. Now the milage dues are properly divided among all the parishes through which the canal runs. The principle is fully established, that the tolls of a canal are ratable as the profits of land, *Rex v. Milton* (a); and it cannot be disputed that the profits of land are ratable in the parish in which the land producing them lies. If there be one entire profit produced by land lying in several parishes, that profit must be divided among the several parishes, in the proportion in which the land in each parish contributes to produce it. In the case of a canal, where the water is constantly flowing from one part to another, all the land over which the water flows contributes to the general navigation. The portions of land lying in different parishes combine, simultaneously, to supply the navigation in one parish. The price paid for that navigation being thus earned by all the land, is the profit of all the land; therefore that profit must be divided equally among all the parts of the canal; in other words, among all the parishes through which the canal runs, in proportion to the quantity of land lying in each. If the tolls of a navigation are to be deemed the profit, not of all the land employed in furnishing the navigation, but of that part of it only over which the navigation is in fact made, it may happen that the land over which no navigation takes place will have no profit at all assigned to it. Suppose this case:—A canal is commenced

(a) 3 B. & A. 112.



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in the parish of *A.*, not for the purposes of navigation *there*, but merely to obtain a supply of water. The canal is not navigated in the parish of *A.*, but is navigated in other parishes, and large profits arise from the use of the water supplied in the parish of *A.* It cannot be said that the land in the parish of *A.* produces no profit, but it will be ratable only in respect of the profits which it contributes to the earning of in other parishes. In *Rex v. The New River Company (a)* it was found that a certain piece of land, rated at 300*l.* a year, was, if not covered with water, worth only 5*l.* a year; but if the advantage which the company derived, in other parishes, from the use of the water, might by law be included in the rate upon the land in which the water arose, the land and water together were of the annual value at which they were rated; and the Court held that that advantage might by law be included in that rate. That case is in principle not distinguishable from the present. There, the water was conveyed to other parishes by pipes under ground, here, in trenches above ground; there, it was sold to housekeepers for domestic purposes, here, it is sold to bargemen for the conveyance of their goods. *Rex v. The Mayor of Bath (b)*, *Rex v. The Rochdale Water Works (c)*, and *Rex v. Palmer (d)*, all concur in establishing this principle; and in the latter *Abbott, C. J.*, said, "Here the navigation runs through fourteen different parishes, and the whole is rated in one parish. Now having decided that a canal is ratable in each and every parish through which it passes, it follows that this rate should have been divided into fourteen different portions, instead of being imposed entirely in one parish. If this were not so, the navigation might be rated twice over. The principle upon which this is founded is very plain and simple. I have the utmost reverence for the learning of the judges who decided some of the former cases upon questions of this nature, where a contrary doctrine has been held, but still, of late years, the

(a) 1 M. & S. 503.

(b) 14 East, 609.

(c) 1 M. & S. 634.

(d) 2 D. & R. 793; 1 B. & C. 546.

Court has been gradually coming to what is the true principle, and unquestionably the common sense of the thing, namely, that in whatever parish the land is occupied, as land covered with water, and is productive of profit to the proprietor, it is to be rated in each and every parish, according to the profits it produces, although they may not be received in that parish, but in another and different parish." (a) [Parke, J. If in one parish there were several locks, and by reason of the expense of erecting and maintaining them, there were a larger sum payable than in other parishes, would you say that the charge of those locks, for the purpose of ascertaining the rate, should be made with reference to the expense in the particular parish, or with reference to the general fund?] To the general fund, certainly. The locks alone might in many cases prove to be a loss in the particular parish, unless the expenses were chargeable to the general fund. Secondly, the lock dues must be apportioned in the same manner as the mileage dues. The lock duty of one penny per ton is given expressly *in lieu* of the milage duty of three halfpence per ton. If the one constitutes a general profit divisible among all the parishes, why should not the other? The locks are a part of the canal, and the lock dues are merely substituted for the milage dues upon that particular part of the canal. The other locks upon this canal are not distinguished as respects the toll from the general line of the navigation; the toll for passing through them, therefore, must clearly be distributed along the whole line of the canal: and it seems difficult to say why a different rule should be applied to the two Severn locks, the toll of which differs from that of the others only in amount, that difference of amount being only sufficient to meet the increased expense of maintaining the Severn locks. [Parke, J. Suppose these locks belonged to one person, and the rest of the canal to others, where should the lock dues be rated?] In Lower Mitton, no doubt; because then, though the profits would

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(a) 2 D. & R. 797.

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be earned by means of water coming along the whole line of the canal, it would not come from *his* land. The cases in which the profits of a lock arising exclusively from land lying within the parish have been held to be wholly ratable in that parish, do not apply, because here the profits arise in part from land lying in other parishes. *Rex v. Kingswinford* (a) will doubtless be relied on for the other side, but that case is distinguishable from the present, for there it could not be pretended that one of the three canals contributed to produce the toll given in respect of the others. That decision, therefore, cannot affect this case; and though it may be endeavoured to give the observations of *Bayley, J.* there a more extended application than they were intended to have, they must be construed with reference to the circumstances of the particular case: if they were understood as having a more general application, they would be at variance with the principle laid down in *Rex v. Palmer* (b).

*Shutt, contra.* The case of *Rex v. Kingswinford* (a) is not distinguishable from the present, and shews clearly that the company should be rated for these lock dues wholly in the hamlet of Lower Mitton. The fallacy of the whole argument on the other side is, that it assumes the water to be rated instead of the land. If that argument is well founded, every parish in which there is the smallest contributory stream may rate the company for the proportion of its meritorious services, in bearing a part of the water, the whole of which, it is said, earns these dues; and all the land over which the Severn passes, from its source in Plinlimmon to the hamlet of Lower Mitton, will be entitled to participate in these dues, because a part of the water by which they are earned is supplied by the Severn. It might as well be contended that the approaches to a bridge are entitled to participate in the tolls of a bridge, because, without those approaches, no person could reach the bridge,

(a) *Ante*, i. 20; 7 B. & C. 236. (b) 2 D. & R. 793; 1 B. & C. 546.

and no toll could be earned. *Rex v. Cardington* (a) is decisive upon this point. *Rex v. The New River Company* (b) is an essentially different case: there were no boats there; the profit was derived not from the use of the water, by working boats along the canal, but by the sale of the water itself. In *Rex v. Palmer* (c), *Abbott, C.J.*, said, "This is very different from the case of a sluice. In that case the tolls become due for the use of the sluice itself, and the proprietor must contribute to the relief of the poor in that parish where the sluice is situate" (d). Here the toll becomes due for the use of the lock, and the same consequence follows.

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The case was argued on a former day in these sittings, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J.—The question in this case was, whether the profits of some locks which were situate in Lower Mitton, were ratable in all the different parishes through which the canal to which they appertained ran, in proportion to the land in each parish; or whether they were to be rated wholly in the parish in which the locks were situate. The sessions were of opinion that they were to be rated throughout the whole line of the canal, proportionably in each parish; and we are of opinion that their decision was wrong. It is fully established by *Rex v. Milton* (e), and *Rex v. Palmer* (c), that the profits of a canal or navigation are ratable as the profits of land covered with water in the particular parish in which the land lies; and it follows from thence, and was so decided in *Rex v. Kingswinford* (f), that they are ratable in each parish in proportion to the profit which that part of the land covered with water which lies in the parish produces. If it is more productive in

(a) Cowp. 581.

(b) 1 M. & S. 503.

(c) 2 D. & R. 793; 1 B. & C. 546.

(d) 1 B. & C. 550.

(e) 3 B. & A. 112.

(f) *Ante*, i. 20; 7 B. & C. 236.

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some than in other parts of the canal, either because there is more traffic or because larger tolls are due upon it, or because the outgoings and expenses there are less, it must be assessed at a higher proportionate value. It was, however, contended that there is a distinction between a canal or navigation and a lock, and that a lock is profitable, because it is supplied with water from the rest of the canal lying in other parishes. This argument, assuming it to be well founded, only proves that a part of the source of profit is derived from the other parishes through which the canal passes, and that consequently a part only of the lock dues ought to be ascribed to those parishes; for the dues are payable as well for the use of the water derived from the Severn as from the canal, and also for the use of the soil and fixed machinery of the locks; and therefore the rule adopted by the sessions, even according to the argument on the part of the respondents, was wrong. We are of opinion, however, that there is no distinction, as to its ratability, between a lock and a portion of a canal or river navigation; and that, whether the subject-matter of the occupation be productive in itself, or rendered productive by something derived from another parish, or by being used in conjunction with property in another parish, no difference is to be made in the mode of rating. Thus, whether the water of a canal be derived from the same parish or another parish, whether conveyed in pipes or carts, or by engines, makes no difference, if the land in which it is placed be thereby rendered more valuable. It makes no difference whether it remains comparatively still as in a canal, or is moving continually as in a river, or occasionally as in a lock; nor does it make any difference that, unless there was a canal in another parish connected with the lock, no profit would be gained. It might as well be contended that the profits of a bridge, which would not arise unless there were approaches to it, or of land rendered more valuable by roads in an adjoining parish, should be rated in part only in the parish in which such bridge or land is

situate. The same argument would apply also to a mill. The occupier of a mill is rated in respect of his profits, without considering from whence the water that works the mill comes; if he is obliged to pay a consideration for the use of that water, that may be one of the expenses to be deducted out of the profits made by the mill, but still it would not vary the place where the rate is to be imposed. The order of sessions must therefore be quashed, and the sessions must rate the company according to the annual profit or value which the subject of occupation within the parish produces. That, generally speaking, would be properly estimated at the rent which a tenant would give, he paying poor rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive; and a further deduction from that rent should be allowed, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. This is the rule laid down in *Rex v. The Duke of Bridgewater's Trustees* (a), and *Rex v. Tomlinson* (b). The case, therefore, must be referred back to the sessions, to adjust the rate upon this principle.

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Order of Sessions quashed, and case referred  
 back to the Sessions accordingly.

(a) *Ante*, 143; 9 B. & C. 68.

(b) *Ante*, 169; 9 B. & C. 162.

The KING, on the prosecution of the Inhabitants of the  
 Parish of COTTINGHAM, in the County of Northampton,  
 v. Sir RICHARD BROOKE DE CAPEL BROOKE, Bart.

THE defendant appealed against a rate made for the relief of the poor of the parish of Cottingham, in the county of Northampton, for certain saleable underwoods in that  
 An appeal against a poor rate, on the ground that A. is improperly omitted, cannot be heard unless notice of the appeal, and of the ground of it, have been given to A.

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parish; and the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

There are one hundred and forty acres of land, called Lord *Sondes'* Park, within the parish of Cottingham, in respect of which no person is rated. The park is in the occupation of Mr. *Peach*, as tenant to Lord *Sondes*. Evidence was offered, on the part of the appellant, to prove that, at the time the rate was made, this land was profitably occupied, for the purpose of calling upon the Court to quash the rate, on the ground that no person was rated in respect of it. The evidence was objected to on the part of the respondents, as it had not been proved that notice of the appeal had been served on Mr. *Peach* or Lord *Sondes*. The evidence was rejected. The question for the opinion of this Court was, whether or not the evidence ought to have been admitted.

*Denman*, (*Humfrey* and *M'Dowell* were with him,) in support of the order of sessions. The sessions were right in refusing to hear the evidence. The 41 *Geo.* 3, c. 23, s. 6, expressly provides that persons appealing against any rate shall give notice not only to the churchwardens or overseers of the poor, but to all other persons interested or concerned in the event of the appeal. (Here the Court stopped him.)

*Miller*, *contra*. The sessions ought to have heard the evidence and tried the appeal. The 17 *Geo.* 2, c. 38, s. 6, provides, that upon all appeals from rates, the justices, where they see cause to give relief, shall amend the rate in such manner only as shall be necessary for giving such relief, without altering the rate with respect to other persons mentioned in it; but if, upon appeal from the whole rate, it shall be found necessary to quash it, then they shall order a new rate to be made. That statute, s. 4, requires notice of appeal to be given to the churchwardens or overseers of the poor only. It was at first thought, with refe-

rence to this statute, that whenever an alteration in the rate was necessary by adding the name of a person not mentioned in it, the justices were bound to amend without quashing; *Rex v. Ringwood* (a), *Rex v. Witney* (b); but a contrary opinion has since prevailed, *Rex v. Andover* (c), *Rex v. Darlington* (d). Then the 41 Geo. 3, c. 23, s. 6, provides, that the justices shall not upon appeal amend a rate, by adding the name of a person improperly omitted, unless notice has been given to that person; but it does not therefore follow that the appeal is not to be heard where such notice has not been given; for such an omission vitiates the rate, and it ought to be quashed. Here it appears that a certain tract of land was ratable, and was not rated. [Bayley, J. We cannot tell that it was ratable; the question is, whether the appellant was entitled to go into his case, and prove it ratable.] It is clear that he was, for the purpose of quashing the rate; notice to the occupier is only necessary where the object is to amend the rate. [Bayley, J. In *Rex v. Ambleside* (e) it was held, that the proper course in such a case is to amend the rate, and not to quash it.] But in a later case, *Rex v. The Hull Dock Company* (f), it was held, that in such a case the onus does not lie upon the appellant to give the sessions the means of amending the rate, but that it is the duty of the parish officers to do so. [Bayley, J. But you had no right to proceed at all. You were not in a condition to do so. You had given no notice to the parties, who had a right to cross-examine your witnesses, and to be heard for themselves. Parke, J. If you are right, you may always in such a case insure the quashing of a rate by omitting to give notice to the parties interested. Bayley, J. The present argument is directly against the words of the 41 Geo. 3, c. 23, s. 6.] In *Rex v. Aberavon* (g) this Court confirmed

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(a) Cowp. 326.

(e) 16 East, 380.

(b) 5 Burr. 2634; 2 W. Bl. 709.

(f) 5 D. &amp; R. 359; 3 B. &amp; C.

(c) Cowp. 550.

516.

(d) 6 T. R. 468.

(g) 5 East, 453.



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**Figure 4**

be their occupation or that of individuals. Under such circumstances I cannot say that the sessions have done wrong in quashing the rate." Prior to the passing of the 17 *Geo. 2*, c. 38, wherever any person was improperly omitted in a rate, the Court of Quarter Sessions were bound to quash it. That state of the law produced inconveniences, for remedying which that statute was passed, which, however, though it gave the sessions power to amend, made no provision for giving notice to the person whose name was omitted. It being afterwards thought unjust that a party should be affected by having his name inserted in a rate without notice, the statute 41 *Geo. 3*, c. 23, was passed to remedy that evil. The preamble of that statute recites, that by the 17 *Geo. 2*, c. 38, power was given to justices upon appeals from rates, where they should see just cause to give relief, to amend the same in such manner only as should be necessary for giving such relief, without altering such rates with respect to other persons mentioned in the same. But if Mr. *Miller's* argument were to prevail, the sessions would no longer have the option of amending rates; they would in all cases of omission be compellable to quash them, and thus the number of appeals would be doubled. The sixth section of the 41 *Geo. 3*, c. 23, however, is general, and applies equally to all cases, whether of amending or of quashing rates. It provides, in plain unequivocal terms, that if any person shall appeal against any rate, because any other person is omitted to be rated therein, the person so appealing shall give notice of appeal in writing to the other person so interested in the event of such appeal. In the present case, therefore, it is clear that such a notice of appeal was necessary; and that not having been given, I am of opinion that the course pursued by the justices at sessions was right, and that their order must be confirmed.

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LITTTLEDALE, J., and PARKE, J., concurred.

Order of Sessions confirmed.

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## The KING v. The Inhabitants of WITHERLY.

An unsuccessful search for the appointment of overseers for 1802, made in the parish chest, and among the papers of B. deceased, who had acted as executor to A., who had acted as overseer in that year, is sufficient *prima facie* evidence of the loss of the appointment, to let in parol evidence of its contents, without producing the probate of the will of A. or of B.

TWO justices, by their order, removed *Thomas Oxford* and his wife and children from the parish of Witherly to the parish of Hinckley, both in the county of Leicester. On appeal, the sessions quashed the order, subject to the opinion of this Court upon the following case:—

The pauper was bound apprentice to *William Hurst*, in the appellant parish, to the business of a framework-knitter, by indenture bearing date 6th July, 1802, which witnessed, that *Thomas Goodman*, churchwarden of the parish of Hinckley, and *Robert White*, overseer of the poor of the said parish, by and with the consent of two justices, &c., had put and placed the pauper, a poor boy of their parish, aged eleven years or thereabouts, apprentice to *William Hurst*, until he should attain his age of twenty-one years. This indenture was regularly allowed by two justices, and was executed by *Goodman*, *White*, and *Hurst*.

Under this indenture the pauper served five years in the parish of Hinckley. The respondents admitted that the parish chest of Witherly had been searched, and that nothing relating to the appointment of overseers for the year when the indenture was executed, had been found.

The appellants contended that only one overseer had been appointed for Witherly in that year, and in order to dispose of the original appointment of *White*, in conformity with the case of *Rex v. Stoke Golding (a)*, they called one *Fox*, who stated that *White* was dead; that his, the witness's, father was *White's* executor, and was also dead; that witness's reason for saying his father was executor to *White* was, because he acted as such, and because witness always understood he was left so by the will. To this evidence the respondents objected, but it was admitted by the sessions. The witness also produced a letter from a son of *White*, addressed to witness's father, expressing satisfaction that he was left in trust; which letter was re-

(a) 1 B. &amp; A. 173.

ceived in evidence subject to the same objection. Witness further stated that he had searched his father's papers in the presence of his mother, who, as witness stated, was his father's executrix, but that he found no appointment of *White* as overseer of Witherly among them.

The sessions thought that sufficient search for the appointment had been made, and after hearing parol evidence to prove that only one overseer had, in fact, been appointed for Witherly in the year in question, quashed the order for insufficiency in the indenture.

*Humfrey*, in support of the order of sessions. The decision of the sessions was right. All the means of procuring primary evidence had been exhausted, and the secondary evidence, therefore, was admissible. All that was laid down as requisite to be done in *Rex v. Stoke Golding (a)*, was done in the present case. In that case no notice had been given to the overseer, who was living, to produce the appointment; in this case, the overseer being dead, search for the appointment had been made with his executor; and it was admitted that the parish chest of Witherly had been searched for the same purpose in vain. But it will be contended on the other side, that the person with whom search was made was not satisfactorily proved to have been the executor of the overseer. It was proved that he had acted as executor, and that is sufficient in a case like the present. It was further proved that he had possession of the overseer's papers, and that among those papers the search was made. There was, therefore, reasonable presumption that the appointment had been lost, and then parol evidence of its contents became admissible. The

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(a) There, the indenture had been signed by only one overseer; and it was held, that before parol evidence of there having been only one appointed in that year could be allowed, all the means of procuring the written appointment

must be shewn to have been had recourse to; and that a notice to the appellants to produce all books, papers, &c., was not sufficient, but that the officers themselves should have been subpoenaed. 1 B. & A. 173.

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letter which was found by the executor among the papers of the deceased was also, under the peculiar circumstances of this case, properly received in evidence, for it went to shew not only that he had acted as executor, but that he had done so with the knowledge and approbation of the relatives of the deceased. Strict proof is not required in cases of this description: *Rex v. Stourbridge* (a).

*Hildyard*, contra. The sessions have, in effect, found as a fact, that the parishioners of Witherly, contrary both to law and usage, appointed only one overseer for the year in question. So improbable a fact ought to have been proved by strict and positive evidence, which it is admitted it was not in the present case. *Rex v. Stourbridge* was a very different case from this. There the indenture had been entrusted to a person deceased, for the purpose of carrying it to the parish officer, and it was presumed, first, that the messenger had done his duty and delivered the indenture to the parish officer; and secondly, that the indenture, not being to be found in the parish chest, had been lost; both of which were natural and warrantable presumptions. Here, the appointment not being to be found in the parish chest, and the overseer being dead, the executor of the overseer was undoubtedly the proper person with whom to make a search. But there was no proof here that the person whose papers were examined had been the executor of the overseer. None of the overseer's papers were found among those of the supposed executor. [*Bayley*, J. It is possible that he may have left no papers behind him.] The probate ought to have been produced; that is the only legal proof of a man's being executor. [*Littledale*, J. It was proved that he had acted as executor.] There was no fact whatever proved that led to the inference that he had had the actual custody of the papers of the deceased, and there was no regular evidence of his having had the legal custody of them. All the facts that appeared might

(a) *Ante*, ii. 43; 8 B. & C. 96.

have applied to an executor de son tort, while there was an executor of legal right existing.

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BAYLEY, J.—I do not think the letter was properly received in evidence, but I think enough was done to render the secondary evidence admissible. It was proved that the only overseer who signed the indenture was dead; that a person, who was also dead, had acted as his executor; and that the papers of that person had been searched for the appointment of overseers without effect. It was admitted that the parish chest had been searched, and that no appointment could be found there. For such a purpose as this, strict proof of executorship is not requisite. It is said that the probate ought to have been produced, but the papers of a deceased person may lawfully, and frequently do, pass into the possession of the executor before probate. It is not, therefore, necessary to produce the probate in order to shew that a person acting as executor has the legal custody of the papers of the deceased. I am of opinion that the evidence was sufficient, and that the order of sessions is right.

LITLEDALE, J.—I am of the same opinion. There was no proof that any executor existed, but there was proof that a person had acted as executor; and among his papers, he being dead, search for the appointment was made. That was enough to warrant the presumption that that person was the executor, and would have had the custody of the document if it had been in existence.

PARKE, J.—I am also of the same opinion. I think that, for a purpose like this, search among the papers of a person who had acted as executor, was sufficient. Conclusive evidence of the loss of the document was not necessary. There was *prima facie* evidence of it here, and that was sufficient to let in the parol testimony.

Order of Sessions confirmed.

1849.

The KING v. The Undertakers of the AIRE and CALDER  
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An act of parliament empowered certain undertakers to make navigable a river, and for that purpose to scour and cleanse the river and to dig and cut the banks.

Another act recited that the legal estate and interest in the navigation of the same river, and in certain lands and buildings, was vested in trustees, whom it empowered to sell and convey in fee the said lands and buildings, and to mortgage in fee the said navigation, and the said lands and buildings:—Held, that neither of these acts vested the soil of the bed of the river in the undertakers, and, therefore, that they were not ratable to the poor as the owners or occupiers of the river.


BY a rate made for the relief of the poor of the township of Brotherton in the West Riding of the county of York, the defendants were assessed in the sum of 150*l.* on a total annual value of 2000*l.*, as occupiers and owners of the cut or canal, *and that part of the River Aire* lying within the township of Brotherton, dams, locks, weirs, and toll dues or rates. On appeal, the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

By an act of 10 & 11 *W.* 3, for making and keeping navigable the rivers Aire and Calder, in the county of York, certain persons therein named were empowered, at their own proper costs, to make navigable and passable with barges, boats, lighters, and other vessels, the said rivers Aire and Calder, from Weeland up to the towns of Leeds and Wakefield, and for that purpose to cleanse, scour, open, enlarge or straighten the said rivers or either of them, and to dig or cut the banks of the same, and to make new or larger cuts, trenches, or passages for water in, upon, or through the lands or grounds adjoining or lying contiguous to the said rivers, or either of them, as they should think fit or necessary for the better carrying on and effecting the said undertaking; and to build, erect, set up and make upon the lands adjoining to the said rivers, or either of them, locks, weirs, turnpikes, pens for water, cranes, wharfs and warehouses, where the said undertakers, their heirs or assigns, should think fit. And it was enacted, that for and in consideration of the great expenses which the undertakers, their heirs or assigns, would be at, not only in making the said rivers navigable as aforesaid, but also in repairing and keeping the said rivers navigable and useful for the said navigation, it should be lawful for the said undertakers, their heirs, executors, administrators, and assigns,


and no others, from time to time and at all times thereafter, to demand and take from all persons that should send down or receive up any packs or trusses of cloth, or other merchandizes, wares, or commodities whatsoever that should be conveyed up or down the said rivers, or either of them, the rates and tolls thereafter mentioned; saving and always reserving unto the corporation of Pontefract, in the county of York, and to all other person and persons, their respective heirs, successors and assigns, all royalties and rights, and privileges of fishing, and other dues and duties, in or upon the said rivers, or either of them.

By an act of 14 *Geo. 3*, for amending the act of 10 & 11 *W. 3*, it was enacted, that it should be lawful for the said undertakers, at all times, at their discretion, to cleause, scour, deepen, enlarge, straighten, contract, and improve, and in a good navigable state to keep, and preserve, by all necessary and proper works, ways, and means, as well the said several cuts and canals, and every of them, as also the cuts made under the authority of the said act of *W. 3*, and the channels and courses of the said rivers Aire and Calder, and the beds thereof respectively, not only from the said towns of Leeds and Wakefield to the place called Weeland, but also from Weeland to the conflux or conjunction of the said river Aire with the river Ouse; and to remove all beds of earth, soil, sand, gravel and stone, and all other obstructions and impediments whatsoever, which anywise obstructed the said navigation, either in haling, sailing, or towing of boats, barges, &c., with men, horses, or otherwise; and also to build and set up, or make, over, across, or in the said cuts, canals and channels or courses of the said rivers Aire and Calder, and upon the lands and grounds adjoining or near unto the same, such and so many bridges, tunnels, culverts, locks, sluices, flood-gates and other gates, pens for water, weirs, jetties, weigh-beams, winches, cranes, engines and other works, as should be thought necessary or convenient for the said navigation.

By s. 110 of the said act, after reciting that the legal

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estate and interest in the then present navigation of the said rivers, with the works and appurtenances of navigation thereunto belonging, and the tolls and duties by the said former act granted, and divers messuages, mills, warehouses, buildings, lands, tenements and hereditaments, stood vested in Sir *W. Milner*, *Jeremiah Dixon*, *Richard Wilson* and *Richard Burton*, and their heirs; that is to say, one full moiety or half part of all the premises to the use and behoof of the said Sir *W. Milner* and *Jeremiah Dixon*, their heirs and assigns, for ever; and the other full moiety or half part of all the premises to the use and behoof of the said *Richard Wilson* and *Richard Burton*, their heirs and assigns, for ever; nevertheless upon trust for themselves and the rest of the undertakers of the said navigation, their heirs and assigns; it was enacted, that all and every the lands and hereditaments to be purchased by the undertakers, their heirs and assigns, or for which any sum or sums of money should be assessed under and by virtue of that act, should, upon payment of the purchase-money for the same, or the sum or sums so to be assessed in satisfaction, be conveyed unto, or otherwise should, together with all the rates, tolls and duties by the now reciting act granted, and the said cuts and canals, and every of them, and all other the works of navigation to be made by virtue of the powers thereof, stand and be vested in the said Sir *W. Milner*, *Jeremiah Dixon*, *Richard Wilson*, and *Richard Burton*, their heirs and assigns, for ever, upon the like or the same trusts, and to and for the like uses, intents and purposes, and subject to such or the same conditions, provisoes, restrictions and agreements, in all respects whatsoever, as they the said Sir *W. Milner*, *J. Dixon*, *R. Wilson*, and *R. Burton* then stood seised of the said then present navigation, tolls and duties granted by the said former act, and the messuages, mills, warehouses, buildings, lands, tenements and hereditaments aforesaid; and to, for and upon no other use, trust, intent, or purpose whatsoever. And by the said act, after reciting that the said undertakers

stood indebted in divers sums of money on the account of several purchases by them made or contracted for, of certain messuages, mills, lands and tenements upon or near to the said navigation, and upon other accounts concerning the same; and also reciting that the defending the property of the undertakers, and the obtaining that act, had been, and the making and executing the several proposed cuts, canals and other works for the improvement of the navigation, would be attended with considerable expense, and it might become necessary for the said undertakers to raise money, as well for defraying such debts and expenses, as for making future purchases and improvements in their said navigation; it was enacted, that it should be lawful to and for the trustees in whom the legal estate and interest of the said navigation and premises should be then vested, and they the said trustees, and their heirs, were thereby empowered and directed, by any deed or deeds to be by them executed in the presence of two or more credible witnesses, as well to sell and convey in fee simple such messuages, mills, lands, or tenements, belonging to the said undertakers, their heirs and assigns, as should be directed to be sold and conveyed as aforesaid, as to grant, demise, convey and assure in fee, or for any term or number of years by way of mortgage, as well the said *navigation* and the tolls, rates and duties of the same, as also all or any messuages, mills, lands, tenements, and hereditaments, being the undivided property or estate of, or which should thereafter belong to, the undertakers, their heirs or assigns, or any part or parts thereof, as a security for the repayment of all sums of money to be raised or borrowed, unto such person and persons respectively, or his, her, or their trustee or trustees, as should be willing to advance and lend the same.

In pursuance of the powers contained in the said acts of parliament, the undertakers of the navigation of the rivers Aire and Calder have made the said rivers, and still maintain the same navigable and passable in the manner directed by the acts. The river Aire passes through the respondent

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township. The river navigation in that township is of the length of 5428 yards. In one part of the river in that township there is a weir across the river, and a side cut with locks for the purpose of passing boats and barges from the higher level above to the lower level below the weir. The side cut is of the length of 186 yards, and had been made by the undertakers of the navigation in pursuance of the powers given them for that purpose by the act of W. 3. The undertakers of the navigation of the Aire and Calder had never before been rated to the poor in the township of Brotherton, in respect of the navigation, or of their dams, locks, weirs, or the tolls arising therefrom; but have been for many years, and antecedently to the passing of the act of 14 Geo. 3, rated in respect of the tolls of their navigation in the townships of Leeds and Wakefield. The tolls due in respect of goods carried along the navigable channel in the township of Brotherton amount to the sum at which the appellants are rated, but the proportion due in respect of the passage along that portion of the navigable channel which consists of an artificial cut falls far short of that sum. No tolls are received in the township of Brotherton. The appellants contended that they were not, under the circumstances, liable to be rated for the relief of the poor in the township of Brotherton, in respect of the cut or canal, or that part of the river Aire lying in Brotherton, or the dams, locks and weirs, tolls, dues, or rates, or any of them; or, at least, that they were not ratable in respect of the part of the river Aire lying in Brotherton, or the tolls, dues, or rates; and that the rate was bad, as including conjointly various matters, some of which were clearly not ratable, and for not stating explicitly how much was laid on each subject-matter of assessment. The sessions, however, were of opinion that the appellants were, under the circumstances stated, liable to be rated in respect of the navigable channel; and they confirmed the rate generally, subject to the opinion of this Court upon the whole case.

*J. Williams and Archbold*, in support of the order of

sessions. The question is, whether this case can be distinguished from those of *Rex v. The Mersey and Irwell Navigation* (a), and *Rex v. The Avon Navigation* (b); in other words, whether the acts of parliament vest the soil of the bed of the river in the undertakers of this navigation, or give them an easement only: because, in the latter case, it must be admitted upon the authorities cited, that they are not ratable to the relief of the poor. Now, the first act of parliament, 9 & 10 W. 3, undoubtedly does not vest the soil of the bed of the river in the undertakers; and if the case rested on that statute only, it could not be contended that the powers given in this case were greater than those given to the Mersey and Irwell Navigation Company, namely, powers of entering for the purpose of making and maintaining the navigation, which have been held to constitute an easement only. But the subsequent statute of 14 Geo. 3, it is submitted, goes further, and does vest the soil in the undertakers. The 110th section recites that the *legal estate and interest* in the (then) present navigation of the said river, with the works and appurtenances of *navigation* thereunto belonging, and the tolls and duties by the former act granted, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, *stood vested* in certain persons therein named, their heirs and assigns, for ever, upon trust for themselves and the rest of the undertakers. Now the word "navigation" imports the actual soil and bed of the river; not the mere right of using the river for the purpose of passing over it. By another section, the trustees in whom the legal estate and interest in the said navigation and premises should be then vested, were empowered to sell and convey in fee simple the messuages, mills, lands, or tenements belonging to the undertakers, their heirs or assigns; or to convey in fee, or for any number of years, by way of mortgage, as well the said *navigation* and the tolls, as any messuages, &c. being the property of

(a) *Ante*, 84; 9 B. & C. 95.(b) *Ante*, 23; 9 B. & C. 114,  
per nomen *Rex v. Thomas*.

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the undertakers, their heirs or assigns, as a security for the repayment of money borrowed. So that the trustees may either sell or mortgage lands or buildings belonging to the undertakers, but they may only mortgage the navigation and the tolls; a distinction which clearly imports that the trustees had the fee in the navigation or bed of the river.

*F. Pollock, Alderson, and Coltman, contra*, were stopped by the Court.

BAYLEY, J.—It seems to me that the present case is not in substance distinguishable from those to which we have been very properly referred, and that the undertakers of this navigation are not liable to be rated for the bed of the river. In order to make them so liable, they must be “occupiers of lands or houses” within the fair meaning of those words in the statute of *Elizabeth*. Now the cases referred to have established as a rule, that where an act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring and cleansing it, they are not occupiers of the land used for the navigation, but have a mere easement in it. It is conceded that if this case rested upon the act of 9 & 10 *W. 3* alone, it could not be distinguished from the case of *Rex v. The Mersey and Irwell Navigation*; and that if that case was properly decided, the undertakers of the Aire and Calder navigation are not occupiers of land. But it is said that the act of 14 *Geo. 3*, goes further, and does shew that these undertakers are the owners and occupiers of the bed of the river. The 9 & 10 *W. 3* having given the undertakers an incorporeal hereditament, and it clearly did no more, the 110th section of the 14 *Geo. 3* recites that the legal estate and interest in the navigation is vested in the trustees. This part of the argument depends entirely upon the meaning of the word “navigation” as there used. If it means only the incorporeal right of

cleansing and scouring the bed of the river in order to make it navigable, it does not shew that the trustees are the owners of the bed of the river. As the latter act recites that the trustees have some right, we must refer to the former act to see what that right is. The former act, according to the decision in *Rex v. The Mersey and Irwell Navigation*, gave the undertakers an incorporeal right only. Assuming that to be correct, there is nothing in the latter act to shew that the legislature intended to give them any other right. In the interval between the passing of the two statutes there can be little doubt that the company exercised their power of purchasing lands, and acquired corporeal property in those lands. The 110th section of the 14 Geo. 3 recites, that the legal estate in the navigation, and in the lands and buildings is in the trustees. But that statute no where vests any thing in them; the former statute alone vests any thing in them: and that gives the undertakers an incorporeal hereditament only in the bed of the river, and a corporeal hereditament in other things, namely, the land and buildings. Then it is said that a subsequent clause empowers the persons having the legal estate and interest in the navigation, as well as the other property, to mortgage in fee the navigation and the tolls, as well as the other property; and that the use of the word *navigation* there shews an intention on the part of the legislature to give the trustees of the navigation power to convey the fee in a corporeal hereditament, because else the introduction of the word *navigation* would have been unnecessary, as the mention of the tolls and other property would have been sufficient. But I cannot attach any weight to this argument. The word "navigation," being used in the act, would enable the trustees, by introducing the same word into a mortgage deed, to give a mortgagee the right of cleansing and scouring the bed of the river, and to make or maintain it navigable, and thereby pass to a mortgagee the legal estate and interest which the trustees had in the incorporeal

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after mentioned. Plea, not guilty; and issue thereon. At the trial before *Burrough*, J. at the Somersetshire summer assizes, 1827, a verdict was found for the lessor of the plaintiff with certain points reserved, as to which this Court directed the facts to be stated in a special case:—

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The manor of Wantage, in the county of Somerset, is parcel of the possessions of the dean and chapter of the cathedral church of Wells. On the 9th April, 1744, and the 4th November, 1746, three copyhold tenements within and parcel of that manor were, upon the surrender of *W. Tice* and *Mary Tice*, granted by copies of court roll in reversion to *Malachi Tice*, and his sister *Mary Tice*, for and during the term of their lives successively, according to the custom of the manor, to commence immediately after the death, surrender, or forfeiture of *W. Tice* and *Mary Tice* his wife. On the 26th October, 1782, the reversion of two of these tenements was granted by copy of court roll by the dean and chapter to *Jonathan Sweeting*, *Thomas Pocock Sweeting*, and *John Winsor Sweeting*, habendum to them for the term of their lives and the life of every and either of them longest living successively, according to the custom of the manor, immediately after the death, surrender, or forfeiture, or other sooner determination of the estate then subsisting for the lives of *Malachi Tice* and *Mary Tice* his sister; and *J. Sweeting*, *T. P. Sweeting*, and *J. W. Sweeting*, were admitted tenants as in reversion. *Malachi Tice*, the survivor of the two lives, upon the death of whom the reversion of these tenements was expectant, died in September, 1819, *J. Sweeting* in October, 1825, and *T. P. Sweeting* in January, 1826, since which period the lessor of the plaintiff, *J. W. Sweeting*, the person last named in each habendum and admission, has been and now is in possession of the copyhold tenements conveyed by the copies above set out, and in the receipt of all the rents and profits thereof.

By an act of 37 Geo. 3, for dividing, allotting and inclosing certain moors, commons, or waste lands and grounds lying and being within the parishes of North Curry, Stoke,



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St. Gregory, and West-hatch, in the county of Somerset, after reciting the existence of certain uninclosed moors and commons in the several parishes mentioned in the title of the act, and the claims of different lords of manors to the soil of certain of those moors, and the claims of other persons to rights of common thereon in respect of certain old auster or ancient tenements, certain commissioners were appointed for setting out, dividing, allotting and inclosing the said moors, commons, or waste lands, with certain exceptions; and for preventing all unnecessary delays in the division and inclosure, the commissioners were directed to perambulate and stake out the boundaries; and it was provided, that all and every person or persons having or making any claim or claims which might affect the boundaries, or any claim to right of common, right of stocking, or any other right or interest whatsoever, in, upon, or over the said moors, commons, or waste lands and grounds thereby intended to be divided and inclosed as aforesaid, or any part or parts thereof respectively, should, by themselves or their agents respectively, give and deliver to the commissioners or any two of them, at their first or second meeting to be held in pursuance of the act, an account in writing of his, her, or their respective claims; if such claims were objected to at the first, second, or third meeting, the act provided that the objections should in the first instance be decided by the commissioners, and gave subsequent modes of settling the disputes if their decision were unsatisfactory; but in case no such claims or objections should be made, or the parties claiming or objecting neglected or refused to adopt such subsequent modes, then the determination of the commissioners was to be final and conclusive to all intents and purposes. Certain allotments were then directed to be made to the dean and chapter of Wells, and other lords of manors, in lieu of their right of soil, and to other persons in respect of other interests, the act stating that the said dean and chapter had agreed not to accept or take any allotment or allotments, in lieu of rights of soil, out of the shares which

should be allotted by the commissioners to their several and respective tenants in right of their several and respective tenements held under the said dean and chapter, by lease or copy of court roll.

By another clause it was enacted, that the commissioners should set out, divide, allot and inclose all the residue and remainder of the said moors, commons, or waste lands and grounds so intended to be divided and inclosed as aforesaid, unto, for and among all and every person and persons, proprietor and proprietors interested therein in respect of their said old auster or ancient tenements, without any respect to the yearly value of such tenements, it being intended by that act that each proprietor of the said old auster or ancient tenements should have an equal allotment of the said respective moors, commons or waste lands and grounds, share and share alike; and that it should be lawful for the commissioners, or any two of them, to set out, allot, inclose and award to and for each and every proprietor and proprietors, his, her, and their shares and proportions of the said respective moors, commons, or waste lands and grounds, in one entire allotment on such of the said moors, commons, or waste lands and grounds, as to the said commissioners, or any two of them, should seem most proper, quantity, quality, situation and convenience considered; and that the several and respective allotments to be assigned, set out, and allotted unto and for the several persons who should be entitled to the same, should be in full bar of and compensation for his, her, or their respective rights or interests in, over and upon the said moors, commons, or waste lands and grounds, or any part thereof; and that immediately from and after the said commissioners should have so set out, allotted and inclosed any part of the said moors, commons, or waste lands and grounds, to and for any person or persons by virtue of that act, all right of common in, over and upon such parts or parcels so inclosed as aforesaid, should cease and be for ever extinguished.

The act contained the following proviso:—"Provided

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always, and be it further enacted, that nothing in this act contained shall extend, or be construed, deemed, or judged to revoke, make void, alter, or annul any will or settlement, or to prejudice any person or persons having any jointure, dower, portion, or incumbrance out of, upon, or any ways affecting any of the lands so intended to be divided and inclosed, or which shall be exchanged by virtue of this act; but that the several messuages, tenements, fences, lands, hereditaments and premises so to be set out and allotted upon such division and inclosure, or which shall be taken in exchange in pursuance of this act, shall immediately after such allotment or allotments, exchange or exchanges shall be made, remain and enure to and for such and the same uses, intents and purposes, as the several messuages, tenements, farms, lands, and hereditaments in respect or in lieu of which such allotments and exchanges shall be made as aforesaid, now are, or should or would have been, in case this act had not been made."

The act concluded with the following general saving clause:—"Saving always to the king's most excellent majesty, his heirs and successors, and to all and every other person and persons, bodies politic and corporate, his, her, or their heirs, successors, executors and administrators, other than and except the several persons to whom any allotment or allotments shall be made, and whose rights are hereby intended to be barred and extinguished, all such estates, right, title, interest, claim and demand as they, or any of them had or enjoyed of, in, to, or out or in respect of the said moors, commons, or waste lands and grounds so intended to be divided and inclosed as aforesaid, at the time of passing this act, or could or might have had and enjoyed in case the same had not been made."

The commissioners made their award 21st June, 1800, and thereby allotted to *T. P. Sweeting*, and to the said dean and chapter, according to their respective rights and interests, for and in respect of a certain old auster or ancient tenement called *Elms's*, situate and being in the said parish

of North Curry, one piece or parcel of ground therein particularly described, as containing by admeasurement 2 roods 2 perches, and numbered 7 on the said plan; and one other parcel of ground, therein also particularly described, and numbered 416 on the said plan; and also to the said *T. P. Sweeting* and the said dean and chapter, according to their respective rights and interests, for and in respect of a certain old auster or ancient tenement also called Elms's, situate and being in the said parish of North Curry, one piece or parcel of ground, numbered 417 on the said plan; and also to the said *T. P. Sweeting* and to the said dean and chapter, according to their respective rights and interests, for and in respect of a certain old auster or ancient tenement called Tice's, situate and being in the said parish of North Curry, one piece or parcel of ground, therein also particularly described, and numbered 418 on the said plan.

It did not appear in evidence that any other allotments had been made by the said award to the said *T. P. Sweeting*, or to the said *Jonathan Sweeting*, or *Malachi Tice*, or that any claim had been made before the said commissioners by them or on their behalf, except as hereinafter stated. *T. P. Sweeting* was not, at the time of the inclosure and award, in possession of either of the said copyhold tenements, but he made the claim for allotments in respect of them before the commissioners. The three tenements called in the award Elms's and Tice's, were the copyhold tenements first above mentioned, so named from the preceding owners, and the allotments were made in respect of those tenements. The allotment numbered 7 had, from the date of the award, always been held by the owner of the copyhold tenements, but *T. P. Sweeting* had always, from the date of the award, held the allotments numbered 416, 417, and 418, to the time of his death, without payment of rent, or any other acknowledgment to the owner of the copyhold tenements; and they had been so held by the defendants claiming under him, since his death, as executors of the will of *T. P. Sweet-*

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ing, and devisees in trust. For these three allotments the present action was brought.

*Coleridge*, for the lessor of the plaintiff. The legal estate in the three allotments is in the lessor of the plaintiff, *John Winsor Sweeting*, and he is entitled to recover them in the present action. It will be said that no claim was made before the commissioners by him or on his behalf; that the inclosure act required a claim to be made, and therefore that he is barred; and the case of *Doe v. Jefferson (a)* will be relied on. It was there held, that the sixth section of the general inclosure act, 41 *Geo. 3*, c. 109, limiting the time for making claims before the commissioners, could not be taken to apply only to allotments in respect of land, but extended to tithes also; and that the lessor of the plaintiff, who had neglected to make a claim for tithes within the time limited by that section, could not prevail in ejectment against a party in possession of an allotment actually set out in respect of the tithes, although the party under whom he claimed title had also omitted to make a claim according to the statute. But the decision in that case does not at all affect the present, because it proceeded upon the ground that no claim had been made by any person. Here a claim was made by *Thomas Pocock Sweeting*, which must be considered as having been made by him on behalf of all the parties interested in the copyhold estate, of whom the lessor of the plaintiff was one. That claim, therefore, enures to his benefit; for it is enough to satisfy the statute if a claim has been made in respect of the estate by any person interested in it. Then it will be said that the award of the commissioners is final and conclusive, and gives the title to the allotments absolutely to the persons named therein. But in *Kingsley v. Young (b)* Lord *Eldon* treated the award of the commissioners as rather constituting evidence of title, than an absolute title to the allotments.

(a) 9 Moore, 260; 2 Bingh. 118.

(b) 18 Ves. 206.

An allotment is given to a claimant, not as an individual, but in respect of the estate in which he is interested; and in respect of the whole estate and all parties interested in it, not in respect of his particular interest only. The act provides that nothing therein contained shall revoke or annul any will or settlement; and the limitations entered on the court roll may, in furtherance of the intention of the legislature, be fairly regarded as a settlement; and if so, the land allotted must remain and enure to the same uses, intents, and purposes, as the copyhold estates in respect of which the allotments were made.

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*Jeremy, contra.* This action cannot be maintained. There is no legal title in the lessor of the plaintiff. The legal estate in the allotments vested, by force of the inclosure act and the award, as a freehold in *Thomas Pocock Sweeting* and the dean and chapter. The legal title to land allotted by commissioners under an inclosure act, is derived entirely from the award; and the Court must look to the award, and to that only, for the purpose of seeing in whom the legal title is vested. Now it has been decided that land allotted in lieu of rights incident to a copyhold estate, becomes, by force of the award, a freehold estate of inheritance in the allottee: *Revell v. Jodrell (a)*, *Townley v. Gibson (b)*, *Doe v. Davidson (c)*. Here, the land is, by the award, allotted to *Thomas Pocock Sweeting* and the dean and chapter. The award, therefore, operated as a grant to them in fee, and the dean and chapter are the surviving grantees. The legal estate, therefore, is in them, and not in the lessor of the plaintiff. A dean and chapter may take as a body politic: *Com. Dig. Capacity, (A.) 2*. No claim was made by or on behalf of the lessor of the plaintiff, and on that ground he is barred, *Doe v. Jefferson (d)*; that case was decided upon the sixth section of the general inclosure act, 41 Geo. 3, c. 109; but the words of the inclosure act

(a) 2 T. R. 415.

(b) 2 T. R. 701.

(c) 2 M. & S. 175.

(d) 9 Moore, 260; 2 Bingham, 118.


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the undertakers, their heirs or assigns, as a security for the repayment of money borrowed. So that the trustees may either sell or mortgage lands or buildings belonging to the undertakers, but they may only mortgage the navigation and the tolls; a distinction which clearly imports that the trustees had the fee in the navigation or bed of the river.

*F. Pollock, Alderson, and Coltman*, contra, were stopped by the Court.

BAYLEY, J.—It seems to me that the present case is not in substance distinguishable from those to which we have been very properly referred, and that the undertakers of this navigation are not liable to be rated for the bed of the river. In order to make them so liable, they must be “occupiers of lands or houses” within the fair meaning of those words in the statute of *Elizabeth*. Now the cases referred to have established as a rule, that where an act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring and cleansing it, they are not occupiers of the land used for the navigation, but have a mere easement in it. It is conceded that if this case rested upon the act of 9 & 10 *W. 3* alone, it could not be distinguished from the case of *Rex v. The Mersey and Irwell Navigation*; and that if that case was properly decided, the undertakers of the Aire and Calder navigation are not occupiers of land. But it is said that the act of 14 *Geo. 3*, goes further, and does shew that these undertakers are the owners and occupiers of the bed of the river. The 9 & 10 *W. 3* having given the undertakers an incorporeal hereditament, and it clearly did no more, the 110th section of the 14 *Geo. 3* recites that the legal estate and interest in the *navigation* is vested in the trustees. This part of the argument depends entirely upon the meaning of the word “navigation” as there used. If it means only the incorporeal right of

cleansing and scouring the bed of the river in order to make it navigable, it does not shew that the trustees are the owners of the bed of the river. As the latter act recites that the trustees have some right, we must refer to the former act to see what that right is. The former act, according to the decision in *Rex v. The Mersey and Irwell Navigation*, gave the undertakers an incorporeal right only. Assuming that to be correct, there is nothing in the latter act to shew that the legislature intended to give them any other right. In the interval between the passing of the two statutes there can be little doubt that the company exercised their power of purchasing lands, and acquired corporeal property in those lands. The 110th section of the 14 Geo. 3 recites, that the legal estate in the navigation, and in the lands and buildings is in the trustees. But that statute no where vests any thing in them; the former statute alone vests any thing in them: and that gives the undertakers an incorporeal hereditament only in the bed of the river, and a corporeal hereditament in other things, namely, the land and buildings. Then it is said that a subsequent clause empowers the persons having the legal estate and interest in the navigation, as well as the other property, to mortgage in fee the navigation and the tolls, as well as the other property; and that the use of the word *navigation* there shews an intention on the part of the legislature to give the trustees of the navigation power to convey the fee in a corporeal hereditament, because else the introduction of the word *navigation* would have been unnecessary, as the mention of the tolls and other property would have been sufficient. But I cannot attach any weight to this argument. The word "navigation," being used in the act, would enable the trustees, by introducing the same word into a mortgage deed, to give a mortgagee the right of cleansing and scouring the bed of the river, and to make or maintain it navigable, and thereby pass to a mortgagee the legal estate and interest which the trustees had in the incorporeal

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were, are, or should or would have been, in case the act had not been made. If, therefore, the copyhold tenement in question had by settlement or will been granted to several persons in succession, in the same manner as it is in the court rolls, the allotments in question would have enured to the same uses and in the same succession as the copyhold tenement. Giving a liberal construction to this proviso, in pursuance of the plain intention of the legislature, I think the copyhold estate in question may be regarded as limited by settlement, within the meaning of that word in the proviso: and that whatever particular interests were in the copyhold estate at the time when the act passed, are, by force of the proviso, made to attach to the allotments. That being so, the legal estate in the lands allotted vested, on the death of *Thomas Pocock Sweeting*, in the lessor of the plaintiff, and was in him at the time when this action was brought. I am, therefore, of opinion that the action is maintainable, and that the judgment of the Court ought to be for the plaintiff.

LITTLEDALE, J., and PARKE, J., concurred.

Judgment for the plaintiff.

END OF TRINITY TERM.



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#### IV. *Operation of award.*

*See* INTEREST, 9.

5. Where all matters in difference in a cause are referred, and the arbitrator awards to the plaintiff a sum in satisfaction for his damages in the cause, the plaintiff cannot afterwards support another action for a demand within the scope of the reference, and which he might have brought before the arbitrator. *Dunn v. Murray*. 571

## ARREST.

*See* AFFIDAVIT, I.—INSOLVENT DEBTOR, 1.

#### I. *Out of the jurisdiction.*

1. A British subject, arrested abroad under a warrant upon an indictment for a misdemeanour, brought in custody to England, and there committed to prison, is not entitled to be discharged. *Per Lord Tenterden, C.J. and Parke, J.; dubitante Littledale, J. Scott, ex parte*. 361

## ASSIGNEES. 751

### ARTICLED CLERK.

*See* ATTORNEY, I.

### ARTICLES OF WAR.

#### I. *Jurisdiction.*

1. The fraudulent charging by a purser of stores which were never issued, and the making of false entries in the ship's books to cover such charges, are an offence punishable "according to the laws and customs in such cases used at sea," as amounting, under 22 *Geo.* 2, c. 33, s. 36, to "a crime not capital, committed by persons in the fleet, not before mentioned in the act, and for which no punishment is thereby directed to be inflicted." *Mann v. Owen*. Page 449

### ASSENT.

#### I. *To the vesting of an estate.*

*See* DISCLAIMER, 1, 2, 3.—SURRENDER, 3, 4.

#### II. *Of executor, to a bequest.*

*See* BANK OF ENGLAND, 1.

### ASSESSMENT.

*See* RATE.

### ASSETS.

#### I. *By Descent.*

*See* FORMEDON, 1.

#### II. *In futuro.*

*See* EXECUTOR, 5.

#### III. *Legal or equitable.*

*See* DEVISE, III.

### ASSIGNEES.

#### I. *Of Bankrupts.*

*See* BANKRUPT, 7, 9, 11.—MORTGAGE, 3.

#### II. *Of Reversions.*

*See* COVENANT, 2, 3.

**ATTORNEY,****ASSIGNMENT.****I. Of a term.**

See **BENEFICE**, 1.

**II. Of a reversion.**

See **COVENANT**, 2, 3.

**III. Of breaches.**

See **COUNTY TREASURER**, 2.

**IV. Of a debt.**

See **ATTORNEY**, 2.

**ASSUMPSIT.**

See **ACTION**, 1, 2, 3.

**ATTACHMENT.**

See **ERROR**, 3.

**ATTESTATION.**

See **WITNESS**, III.

**ATTORNEY.****I. Articled clerk.**

1. *A.* and *B.* are partners as attorneys, *C.* is articled to *A.*, who receives the whole premium, and dies pending the clerkship. *C.* is to be considered as substantially the clerk of a firm which vests in *B.* by survivorship; and *B.* is liable to return an adequate proportion of the premium. *Ex parte Bayley*. Page 603

**II. Duties of.**

See **EJECTMENT**, 3.

**III. Bill of Costs.**

2. An undertaking to pay the costs of the plaintiff's attorney in an action still pending, in consideration that the plaintiff will, with the consent of that attorney, give an authority to the defendant to pay over the debt sued for to a creditor of the plaintiff, is not binding. *Taylor v. Watson*. 259

**BANK OF ENGLAND.****ATTORNMENT.****I. When required at common law.**

And see **DISTRINGAS AD ATTORNANDUM**.—**QUEM REDDITUM REDDIT**.—**QUID JURIS CLAMAT**.

1. No attornment to an alienation made antecedently to the creation of the tenancy of the party attorning. Page 196 (b)

**AUTHORITY.**

See **ACTION**, 1.—**AGENT**.—**MASTER AND SERVANT**, 1.

**AVON NAVIGATION.**

See **RATE**, 1.

**AWARD.**

See **ARBITRAMENT**, IV.—**INCLOSURE ACT**, 1.

**BAIL.****I. Where discharged.**

1. Bail are not discharged by the levying of part of the debt under a *fi. fa.* *Stevenson v. Crease*. 561
2. Nor are bail discharged by a *cognovit* given without their knowledge or assent, where no part of the debt and costs is made payable at a time subsequent to the earliest day on which execution might have been obtained. *ibid.*

**BANK OF ENGLAND.****I. Duties of, in respect of stock bequeathed.**

1. Where stock is specifically bequeathed, the executor may compel the Bank to permit him to transfer it, unless it appear that he has assented to the bequest. *Franklin v. The Bank of England*. 11

## BANKRUPT.

### BANKRUPT.

#### I. Trading.

1. A trading which had been discontinued before the passing of 6 Geo. 4, c. 16, will not support a commission issued since 1 Sept. 1825. *Surtees v. Ellison*. Page 586. *Hewson v. Heard*. *ibid*.
2. A person purchasing land for the purpose of making bricks from it, and selling them, and agreeing to pay 4s. per 1000 bricks in part of the purchase-money, and making and selling bricks accordingly, is not a trader within the meaning of 6 Geo. 4, c. 16, s. 2. *Heane v. Rogers*. 486

#### II. Petitioning creditor's debt.

3. A debt, which the creditor has covenanted with the debtor not to sue him for, is not a good petitioning creditor's debt. *Small v. Marwood*. 181
4. Goods were assigned by A. to B. C. D. and E., upon trust to pay themselves, and such other creditors of A. as should execute the deed, provided the trustees and creditors executed on or before a certain day. The deed contained an absolute covenant that the trustees and creditors would not sue, arrest, implead, or prosecute A., or his executors, &c. or his or their goods, lands, &c. The deed was executed within the time by B. and C., but not by D. or E. This deed enures as a release of the debts owing to B. and C.; and a commission of bankrupt afterwards issued by B., is void, for want of a subsisting petitioning creditor's debt. *ibid*.

#### III. Act of bankruptcy.

5. Neither a trading which ceased, nor an act of bankruptcy committed, before 6 Geo. 4, c. 16, will support a commission issued since 1 Sept. 1825. *Surtees v. Ellison*, 586, and *Hewson v. Heard*. *ibid*.

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## BANKRUPT. 753

#### IV. Contracts of bankrupt, how affected by bankruptcy.

6. Judgment is entered upon a warrant of attorney against grantor of an annuity, and his surety, before 1 April, 1825; after which day the former becomes bankrupt. By 6 Geo. 4, c. 16, s. 55, no execution can issue against the surety until the value has been ascertained by the commissioners under s. 54. *Hone v. Morgan*. Page 559
7. Where A. and B. submit a dispute to the arbitrament of C., and before any award A. becomes bankrupt, and all his interest in the subject-matter of the dispute is vested in his assignees, B. may lawfully revoke the submission. *Marsh v. Wood*. 504
8. Whether the submission is revoked *ipso facto* by the bankruptcy and assignment, *quære*. *ibid*.

#### V. Liability of agent of bankrupt to his assignee.

9. A. at Liverpool remits a bill to B. in London, with directions to discount it, and pay part of the proceeds to C., and apply the residue in discharge of a debt due to B. from A. and D. jointly. B. does not get the bill discounted, but receives the money when it becomes due, before which time A. stops payment, and desires that the bill might be returned to him. A. becomes bankrupt before the money is received on the bill. The whole proceeds of the bill are money had and received to the use of A.'s assignees. *Buchanan v. Findlay*. 593

#### VI. Fraudulent preference.

10. A trader, in contemplation of bankruptcy, delivered bills of exchange to a creditor, who received the money due upon them after the bankruptcy. The assignee brought trover for the bills:—Held, that the receipt of the money by the



## 754 BARON AND FEME.

creditor was not a conversion, and that the plaintiff could not recover without proving a demand and refusal before the bills became due. *Jones v. Fort.* Page 547

### VII. Creditor, where barred by 6 Geo. 4, c. 16, s. 133.

11. Where a commission of bankrupt issues, under which nine-tenths of the creditors assembled at two meetings called in pursuance of 6 Geo. 4, c. 16, s. 133, agree to accept a composition, whereupon the commission is superseded, a creditor, not present at the meetings, and not acceding to the composition, or proving his debt under the commission, is not barred of his action. *Tuck v. Tooke.* 393

### VIII. Where estopped from disputing commission.

12. A bankrupt who assists in the sale of his own goods under the commission, for the purpose of protecting his property, and of seeing that it is sold to the best advantage, is not thereby estopped from disputing the validity of the commission. *Heane v. Rogers.* 476
13. Neither is he so estopped by giving notice to his lessors of a farm that he is a bankrupt, and is willing to deliver up the lease, which they accept, his assignees not being parties or privies to the transaction. *ibid.*

## BARON AND FEME.

And see LEGITIMATION, I.

- I. *Husband, where bound by act of wife.*
1. The continued adoption by a person of contracts made by his wife, or by a woman whom he holds out to the world as his wife, for necessities ordered by her for the use of the family, is not evidence of a contract by him that his estate shall be liable for necessities ordered by her after his death, and

## BILL OF EXCHANGE.

supplied by the tradesman before he has notice of that event. *Blades v. Tree.* Page 282

### II. *Wife, where bound by act of husband.*

See BILL AND NOTE, 3.

### III. *Woman, how far bound by act of pseudo-husband.*

2. A man and woman had been married and were cohabiting together. Goods which had belonged to the woman before the marriage were seized and sold under an execution against the man. The woman afterwards discovered that the marriage was void:—Held, that she might recover against the sheriff the full value of the goods though exceeding the price for which they were sold. *Glasspool v. Young.* 533

## BENEFICE.

### I. *How far chargeable.*

1. A term created by an incumbent before 57 Geo. 3, c. 99, for the purpose of charging his rectory with an annuity, may be legally assigned since that act to a person who advances a sum for the redemption of the annuity. *Doe v. Gulley.* 249
2. So, though the rector be a party to the assignment, and by the same instrument attempts to subject the rectory to the repayment not only of that sum, but also of other moneys then and previously advanced to him by the assignee. *ibid.*

## BILL OF EXCHANGE, AND PROMISSORY NOTE.

### I. *Acceptance.*

1. On the day before an acceptance becomes due the name of the acceptor is erased, and a new contract between the acceptor and the

## BILL OF EXCHANGE.

drawer, who is also the holder, is indorsed on the bill, but is not stamped. The jury cannot look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent. *Sweeting v. Halse.*

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2. Where a party accepts a bill drawn by one partner in a firm for his private accommodation, upon the understanding that the drawer will provide for the bill when due, no action on the bill lies against the acceptor either by the drawer alone, or by his firm jointly. *Sparrow v. Chisman.*

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3. C. having received rents for the separate use of B., the wife of A., accepts without her privity a bill drawn by D., a creditor of A., payable to D. or order; before the bill becomes due A. and B. require the rents to be paid to themselves, C. refuses to pay his acceptance without an indemnity from D. against the claims of A. and B. The indemnity is given, but C. pays the rents to A. and B. As D. would be liable to refund upon his indemnity he cannot sue C. on his acceptance. *Carr v. Stephens.*

590

### II. Accommodation.

4. A bill drawn payable at the house of the drawer must be presumed to be an accommodation bill, and the drawer is not entitled to notice of its dishonour. *Sharp v. Bailey.*

4

### III. Indorsement.

*Vide supra*, pl. 1; *infra*, pl. 6.

- IV. Discharge of liability by being appointed executor to the holder.

5. If the holder of a promissory note appoint the maker his executor, the debt is discharged. *Freakley v. Fox.*

18

6. And no action lies on the note even by the indorsee of the executor. *ibid.*

## BOUGHT-NOTE. 755

### V. Notice of dishonour.

*Et vide supra*, pl. 4.

7. The holder of a bill of exchange is entitled to know, on the very day the bill becomes due, whether it is dishonoured or not. *Cocks v. Masterman.*

Page 676

8. Therefore, where the bankers of the drawee pay the amount to the holder on the day the bill becomes due, and on the following day discover the acceptance to be a forgery, and give the holder notice of the fact, they cannot recover back the amount from the holder. *ibid.*

### VI. Interest.

9. A security for money lent, whereby the borrower promises to pay the creditor 135*l.* in one month after his arrival in England, carries no interest. *Page v. Newman.*

305

10. As to interest on promissory notes, see 307 (a)

### VII. Evidence.

11. Acknowledgment by one of several makers of a joint and several note, why held binding upon the others. 443 (c)

443 (c)

12. Such an acknowledgment made after the limitation of the statute had attached, is insufficient. 447 (a)

447 (a)

## BLOCKADE.

*See* INSURANCE, I.

## BONA FIDES.

### I. When a protection.

*See* ACTION, 5.—MALICIOUS TRESPASS, 3.—SETTLEMENT, 4.

## BOND.

*See* COUNTY TREASURER, 1, 2.—INTEREST, 8. 10.—OFFICER, 1, 2.—STAMP, 3.

## BOOK DEBTS.

*See* INTEREST, 14.

## BOUGHT-NOTE.

*See* AGENT, 4.

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BREACHES.

See COVENANT, 3, 4.

BRICKS.

See BANKRUPT, 2.

BROKER.

See AGENT, 4.

BURGESSES.

See CORPORATION, 1.

BYE LAW.

1. For regulating election of aldermen of London. Page 39, 65

CANAL.

See RATE, 1, 2, 4, 6, 9.

CANCELLATION.

See SURRENDER, 1, 2.

CAPIAS AD SATISFACIENDUM.

I. *Where issuable.*

1. This process may be awarded after *fieri feci* as to part, and *nulla bona ultra*. *Stevenson v. Crease.* 561
2. And bail may be fixed upon such a writ. *ibid.*

II. *Indorsement on.*

See SHERIFF, 2.

III. *Escape under.*

See SHERIFF, 2, 3.

CAPTURE.

See INSURANCE, 1.

CARRIAGES.

See FRAUDS, STATUTE OF, 3.

CERTIORARI.

See FORCIBLE ENTRY, 3.

CHARITABLE FOUNDATION.

See RATE, 3.

CHARTER.

See CORPORATION, 1.—COSTS, 1.

CIRCUITY OF ACTION.

See BILL AND NOTE, 3.

CLAIM.

See COPYHOLD, 1.

CLERK.

See ATTORNEY, 1.—CORPORATION, 3.

CLERK OF THE PEACE.

See COUNTY TREASURER, 1.

COAL-MINE.

See RATE, 8.

COGNIZANCE OF SUIT.

*Claim of.*

1. How stated. Page 59

COGNOVIT.

See BAIL, 2.

COLLEGE OF PHYSICIANS.

See COSTS, 1.

COMMENCEMENT OF ACTION.

See JUSTICES, III.

COMMITMENT.

See JUSTICES, 1.

COMMON.

See INCLOSURE ACT, 1.—WAY, 1.

COMPENSATION.

See TITHES, 2.

COMPETENCY.

See WITNESS, I. II. III.

COMPOSITION.

I. *By deed.*

1. Goods were assigned by *A.* to *B. C. D.* and *E.* upon trust to pay them—

## CONVERSION.

selves and such other creditors of *A.* as should execute the deed, provided the trustees and creditors executed on or before a certain day. The deed contained an absolute covenant that the trustees and creditors would not sue, arrest, implead, or prosecute *A.* or his executors, &c. or his or their goods, lands, &c.; and it was executed within the time by *B.* and *C.*, but not by *D.* or *E.* The deed enures as a release of the debts owing to *B.* and *C.*; and a commission of bankrupt afterwards issued by *B.* is void, for want of a subsisting petitioning creditor's debt. *Small v. Marwood.* Page 181

II. *With bankrupt, under 6 Geo. 4, c. 16, s. 133.*

See BANKRUPT, VII.

III. *For tithes.*

See TITHES, 1.

## COMPUTATION.

See HUNDRED, 2.—JUSTICES, 4.—RATE, 5.

## CONSIDERATION.

See ACTION, 1.—LOAN, 1, 2.—TOLL, 1, 2.

## CONSTRUCTION.

See DEED, 2.

## CONTINUING BREACH.

See COVENANT, 4.

## CONTRACT.

And see AGREEMENT.

I. *Entirety of.*

See ACTION, 2.

II. *Evidence of.*

See AGENT, 4.

## CONVERSION.

See TROVER.

## CORPORATION. 757

### COPYHOLD.

#### I. *Allotments to Copyholders.*

1. An ancient tenement is granted to *A. B.* and *C.* for life, successively, according to the custom of the manor. After the grant, by an act for inclosing the waste lands of the manor, all persons having rights of common over the wastes are required to give a written statement of their claims to the commissioners, whose determination is to be final; and the commissioners are to allot the wastes among all persons and proprietors interested therein in respect of their ancient tenements; and immediately after such allotment the lands allotted are to enure to the same uses and purposes as the tenements in respect of which the allotments are made, were or would have been holden. Neither *A.* nor *C.* make any claim. *B.* makes a claim, and the commissioners award allotments to *B.* and to the lord, according to their respective rights and interests, in respect of the ancient tenement. The claim by *B.* enures for the benefit of all parties interested in the ancient tenement; and the legal estate in the allotments is vested in *A. B.* and *C.* successively, by the award. *Doe v. Hellard.* Page 736

## CORPORATION.

#### I. *Charter.*

1. Where a charter of incorporation directs that certain officers be elected out of the burgesses and inhabitants, an usage to elect non-inhabitant burgesses is void. *Rex v. Salway.* 314
2. Nor is such usage rendered valid by a charter of restoration granting "all elections and rights of election previously enjoyed by virtue or pretence (*virtute vel pretextu*) of any charter, or by any other lawful manner, right, or title. *ibid.*

II. *Incompatible offices.*

3. The common clerk of a borough is appointed by the mayor, aldermen, and bailiffs, removable at their pleasure, and with a salary variable at their pleasure, and it is his duty to attend the corporate meetings and take minutes of the proceedings. The office of such common clerk and that of alderman are incompatible; and the acceptance of the former vacates the latter. *Rex v. Tizzard.* Page 400
4. On a motion for a *quo warranto* information against a corporator on the ground of the acceptance of an incompatible office, the relator must shew a legal appointment to the second office. *Rex v. Day.* 541

III. *Power of amotion.*  
See 60.IV. *Regularity of proceedings.*  
See SELECT VESTRY, 1.

## COSTS.

I. *For Plaintiff.*

And see pl. 4.

1. By a charter granted to the College of Physicians, confirmed by statute, no one shall practise physic within the city of London, or seven miles round, unless licensed by the college, under a penalty of 5*l.* per month, to be sued for by the college, payable half to the king and half to the college. The penalty is a *debt* vested in the college, the withholding of which is an injury for which damages may be recovered, entitling the college to receive costs if they succeed, and rendering them liable to pay costs under 4 *Jac.* 1, c. 3, s. 2, where they fail. *College of Physicians v. Harrison.* 405
2. A plaintiff who takes judgment of assets *quando* upon *plene administravit*, and obtains a verdict on *non assumpsit testator*, is entitled

to judgment for the costs *de bonis testatoris, et si non, de bonis propriis.*  
*Marshall v. Wilder.* Page 607

II. *For the defendant.*

And see pl. 1.

3. Issue on justification, and a new assignment, on which judgment is suffered by default. Upon a verdict for the defendant on the issue he is entitled to the whole costs of the trial, provided no other plea covering the trespasses newly assigned be found for the plaintiff. *Cross v. Johnson.* 290
4. Where the general issue is on the record and the defendant means to suffer judgment by default on a new assignment, so much of the general issue as applies to the trespasses newly assigned should be withdrawn. *ibid.*
5. An executor nonsuited, &c. upon a declaration containing a count on an account stated with the plaintiff as executor, of moneys owing to him as executor, is liable for costs in respect of such count. *Dowbiggin v. Harrison.* 622
6. After a verdict for the defendant and a rule absolute for a new trial, the plaintiff discontinues the action: the defendant is entitled to the costs of the trial. *Sweeting v. Halse.* 544

III. *Upon rules.*

See PRACTICE, 4.

IV. *Upon motion for criminal information.*

See CRIMINAL INFORMATION, 2.

V. *Security for costs.*

7. A party residing abroad may, upon being admitted to defend an ejectment as landlord, be required to give security for costs. *Doe d. Hudson v. Jamcson.* 570
8. Where an heir brought an ejectment to recover part of premises devised by his ancestor, and failed,

## COUNTY TREASURER.

and afterwards brought a second ejectment against other parties, who held other parts of the devised premises, the Court refused to stay the proceedings in the second action until the costs of the first were paid. *Doe d. Taylor v. Harris.* Page 569

## COUNSEL.

See PRACTICE, 1.

## COUNTY TREASURER.

### I. Duties of.

1. The bond given by the county treasurer to the clerk of the peace, under 12 Geo. 2, c. 29, extends to duties imposed on the treasurer by subsequent statutes. *Farr v. Hollis.* 230
2. A breach of such a bond may be assigned in the defendant as treasurer, having received a certain sum of money, and omitted to account for it, upon being required by the justices at sessions so to do, without adding that he was required to account by an order of justices. *ibid.*
3. Under 43 Geo. 3, c. 47, (Militia Act,) it was the duty of the county treasurer, who reimbursed payments made by overseers to the families of militia men, to transmit an account of such reimbursements to the treasurer of the county for which such militia men were serving. *ibid.*
4. But it was not the duty of such treasurer to demand the amount, or to take legal proceedings for obtaining payment, or to notify to the justices at sessions the transmission of such account and neglect of payment, or to transmit to the justices at sessions an account of similar payments made by himself to the treasurer of another county, that they might make orders for repayment upon the overseers of the parishes for which such militia men were serving. *ibid.*

## COVENANT. 759

## COURT-MARTIAL.

### I. Jurisdiction.

1. The fraudulent charging by a purser of stores which were never issued, and the making of false entries in the ship's books to cover such charges, are an offence punishable "according to the laws and customs in such cases used at sea," as amounting, under 25 Geo. 2, c. 2, s. 36, to "a crime not capital committed by persons in the fleet not before mentioned in the act, and for which no punishment is thereby directed to be inflicted." *Mann v. Owen.* Page 449

## COVENANT.

And see BANKRUPT, 3, 4.—COMPOSITION, 1.

### I. Construction.

1. In a covenant not to keep a public house within half a mile of a particular spot, the distance must be estimated by the nearest mode of access at the time of the covenant, per Lord Tenterden, C. J. and Littledale, J.; or as the crow flies, per Parke, J. *Leigh v. Hind.* 579

### II. Implied.

2. In a lease by B. to A. of the undivided third part of a mine, with the appurtenances, a recital that A. had agreed with B., and with C. and D., the other owners of a mine, to erect a smelting-mill on a waste not demised and not shewn to belong to B., or to B., C. and D., was held to raise a covenant by implication between A. and B. for the erection of such mill. *Sampson v. Easterby.* 422

### III. Running with land.

3. And it was held, that such covenant ran with the land, and passed to the assignee of the reversion of B.'s purparty of the mine. *ibid.*

## 760 CRIMINAL INFORMATION.

### IV. *Where broken.*

4. A new breach of a covenant not to use rooms in a particular manner, is committed every day the rooms are so used. *Doe d. Ambler v. Woodbridge.* Page 302

### V. *Breach, where waived.*

5. Upon a clause of re-entry on breach of covenant, ejectment may be supported in respect of a continuing breach of covenant, though rent has been accepted with knowledge of the original breach. *ibid.*

## COVERTURE.

See *BARON and FEME.*

## COVIN.

See *PLEADING, 1.*

## CREW.

See *INSURANCE, 2, 3.*

## CRIMINAL INFORMATION.

### I. *Against Magistrates.*

1. Where shrubs are cut upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the malicious trespass act, though the title to the spot on which the shrubs grew be in dispute between the parties. *Rex v. Whately.* 431
2. Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him, the magistrate, on oath, whereas no oath had been taken, and the information had been first communicated by the magistrate to the informer, the Court, in discharging a rule for a criminal information against the magistrate, refused to give him costs. *ibid.*

## DEED.

### CUSTOM.

See *CORPORATION, 1, 2.*

### DAMAGES.

#### I. *Where recoverable for detention of debt.*

1. By a charter granted to the College of Physicians, confirmed by statute, no one shall practice physic within the city of London, or seven miles round, unless licensed by the college, under a penalty of 5*l.* per month, to be sued for by the college, payable half to the king and half to the college. The penalty is a *debt* vested in the college, the withholding of which is an injury for which damages may be recovered; entitling the college to receive costs if they succeed, and rendering them liable to pay costs, under 4 *Jac.* 1, c. 3, s. 2, where they fail. *College of Physicians v. Harrison.* Page 405

## DEATH.

See *AGENT, 1.*

## DEBT.

### I. *Action of.*

See *BANKRUPT, 4.—DAMAGES, 1.—INFORMATION, 1.*

## DECLARATION.

See *PRACTICE, 1.*

## DEED.

### I. *Where necessary.*

See *DISCLAIMER, 2.*

### II. *Execution of.*

1. The mere non-execution of a deed is not a refusal to execute. 192 (a)

### III. *Construction of.*

2. Where an instrument shall operate as an appointment, or as a conveyance at common law. 122 (a), 123, n.

### IV. *Production of.*

See *EJECTMENT, II.*

## DEVISE.

### DEFAMATION.

1. As to the distinction between written and oral slander, see page 180

### DEFAULT.

See INFERIOR COURT, 1.

### DEMAND AND REFUSAL.

See TROVER, 1.

### DEPOSIT.

See LOAN, 1.

### DEPUTY.

See OFFICE, 1.

### DESCENT.

See FORMEDON, 1.—HEIR, 1.

## DEVISE.

### I. Construction of. See 74.

### II. What, shall carry trust estates.

1. Lands, of which *A.* is mortgagee in fee, will not pass under a general devise of all *A.*'s lands, if the devise be subjected to uses which *A.* was not entitled to declare in respect of the mortgaged lands. *Galliers v. Moss.* 268
2. A bequest by *A.* to *B.*, his executors, administrators, and assigns, of *A.*'s stock in trade, ready money, and securities for money, debts, personal estate and effects, will not carry *A.*'s legal estate in a mortgage in fee, although a trust be declared that *B.*, his heirs, executors, administrators, and assigns, shall invest the produce thereof, and of *A.*'s real estates, (devised to *B.* by a separate clause, which does not affect the mortgaged property,) in the purchase of land, to be conveyed to certain uses in strict settlement. *ibid.*
3. The limitation of property in a manner applicable only to estates

## DISCLAIMER. 761

over which the devisor is owner, prevents the passing of an estate held by him as mortgagee.

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### III. Whether creating legal or equitable assets.

4. Money arising from the sale of lands devised to executors in trust to sell for the payment of legacies, constitutes equitable, and not legal assets. *Barker v. May.* 386
5. Such money cannot be sued for in the Ecclesiastical Court. *ibid.*

### IV. Remedy of devisee.

6. Upon a devise to *A.* in trust to sell and pay the proceeds to *B.*, an action of account lies against *A.* after he has sold. 390

### V. Protection of possession of devisee.

See COSTS, 8.

## DIRECTORY.

1. Distinction between matters directory, and matters obligatory and essential. 63

## DISAGREEMENT.

See DISCLAIMER, 3.

## DISCLAIMER.

### I. How effected.

1. Disclaimer by parol sufficient in the case of a chattel interest. 186 (b), 191, n.
2. Disclaimer by deed in the case of freehold interests stated to be a modern invention, resting upon a decision which had been reversed in error, and upon a case determined on the special wording of a particular act of parliament. 189 (a), 190, n.
3. Where a feoffment is made to four, one of whom says that he will have nothing in the land, the three cannot sue without the fourth, his freehold not being divested by this disagreement by parol. 191, n.



762 EJECTMENT.

DISCONTINUANCE.

*See* COSTS, 6.

DISCOUNT.

*See* BANKRUPT, 8.

DISSEISEE.

*See* WITNESS, 1.

DISTRESS.

I. *For rent.*

1. Where a declaration contains a count for an excessive distress, and a count in trover, it is competent to the plaintiff at the trial to abandon the special count, and, denying the tenancy, to recover under the count in trover. *Spargo v. Brown.* Page 638
2. Although he has given no intimation to the defendant that such a course will be adopted. *ibid.*
3. Mill-stones, where distrainable. 280 (g)

DISTRINGAS AD ATTORNANDUM.

1. In what cases awarded. 196, n. 197, n.

EASEMENT.

*See* ACTION ON THE CASE, 1.—WAY, 1.

ECCLESIASTICAL COURT.

*See* DEVISE, 5.

ECCLESIASTICAL PROPERTY.

*See* ANNUITY, I.

EJECTMENT.

*And see* INTEREST, 13.

I. *Staying proceedings.*

1. Where an heir brought an ejectment to recover part of premises devised by his ancestor and failed, and afterwards brought a second

ERROR.

ejectment against other parties who held other parts of the devised premises, the Court refused to stay proceedings in the second action until the costs of the first should have been paid. *Doe d. Taylor v. Harris.* Page 569

2. A party residing abroad may, upon being admitted to defend an ejectment as landlord, be required to give security for costs. *Doe d. Hudson v. Jameson.* 570

II. *Production of deeds.*

3. In an action by a termor the attorney of the lessor is bound to produce the lease, it having been deposited with him, by order of a court of equity, for the inspection of the lessee. *Doe d. Curtail v. Thomas.* 218

III. *Between landlord and tenant.*

4. Upon a clause of re-entry on breach of covenant, ejectment may be supported in respect of a continuing breach of covenant, though rent has been accepted with knowledge of the original breach. *Doe d. Ambler v. Woodbrige.* 302

ELECTION.

I. *To corporate offices.*

*See* CORPORATION, 1.—MANDAMUS, 1.

II. *Between liability of principal and agent.*

*See* AGENT, IV.

ENTRY.

*See* ARTICLES OF WAR, 1.—EJECTMENT, 4.—FORCIBLE ENTRY.

EQUITABLE ASSETS.

*See* DEVISE, 4.

ERROR.

I. *In process.*

1. *Semble*, that upon error from an inferior Court, notice cannot be

## EVIDENCE.

taken of an irregularity in bringing the party into Court by attachment, without a previous summons.

*Thomson v. Davenport.* Page 110

2. What informalities in process are assignable for error. 110 (a)

### II. *Venire de novo.*

3. Not to be awarded in cases in which no part of the declaration is sufficient to support a judgment for the plaintiff. 128 (a)

## ESCAPE.

- I. *Liability of sheriff, &c. upon.*  
See 142 (a).

## ESTATE.

### I. *By implication.*

1. Inference, where sufficient. 75(b), 79(b)

### II. *In whom vested.*

2. Lands appointed to *A.* to the use of *B.* are vested in *A.* *Doe d. Worger v. Haddon.* 118

### III. *Particular.*

3. Cannot vest in heir by descent. 74 (a)

### IV. *Tenancy from year to year.*

4. A demise from year to year generally by *A.*, tenant from year to year, enures as a demise from year to year during the continuance of *A.*'s term. *Pike v. Eyre.* 661

## ESTOPPEL.

See BANKRUPT, VIII.

## EVIDENCE.

### I. *Judgment.*

1. Where a defendant suffers judgment by default in an inferior Court, and moves the proceedings into a superior Court, in which he pleads to issue, the judgment by default is not even *prima facie* evidence of the right of action. *Bottings v. Firby.* 567

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### II. *Bought-note.*

2. A note in these words "Bought for Mr. *T.* fifty continental gas shares, 2*l.* premium, (8*l.* already paid) 500*l.*; commission 6*l.* 5*s.*" by a broker to his principal, is not a contract or evidence of a contract; but it is admissible to shew a representation made by the broker to the principal without any stamp. *Tomkins v. Savory.* Page 538

### III. *Admission by agent.*

3. *A.* in pulling down a house adjoining the house of *B.*, employs *C.*, a surveyor, who writes a letter to *B.* respecting the pulling down of *A.*'s house: the letter is evidence against *A.* without calling *C.* *Peyton v. St. Thomas's Hospital.* 605

### IV. *Admission by stranger.*

4. In trover by *A.* against *B.* for goods distrained by *B.*, *A.* having shewn a *prima facie* tenancy under *C.*, by payment of rent to *C.*, it is not competent to *B.* to produce the written acknowledgment of *C.* that he received such rent as agent for *B.*, no connexion between *B.* and *C.* being shewn aliunde, and it not appearing at what period the acknowledgment was made. *Spargo v. Brown.* 638

### V. *Presumptive.*

5. Livery of seisin of land cannot be presumed from a feoffee's possession of less than twenty years. *Doe d. Wilkins v. Parsley.* 666
6. An indorsement on a feoffment, that *A.* delivered seisin in the presence of *B.* is no evidence of the fact against the party out of whose possession the feoffment comes, but who does not claim under it. *ibid.*

### VI. *Secondary.*

7. An unsuccessful search in the parish chest, and among the papers of *B.* who had acted as executor to *A.*, who had acted as overseer

## 764 EXECUTORS.

for *A.*'s appointment, is sufficient *prima facie* evidence of the loss of the appointment to let in parol evidence of its contents without producing the probate of the will of *A.* or of *B.* *Rex v. Witherly.*

Page 724

8. A pauper hired herself under a written agreement to work in a factory for four years at weekly wages, and "to observe all the rules with regard to the hours of attendance and of work." The rules were not reduced into writing, and were occasionally varied by the master. But the pauper was told that she must work twelve hours a day. This parol communication is not admissible to explain the written agreement. *Rex v. St. John, Devizes.* 680

### EXAMINATION.

See FELONY, 1.—HUNDRED, III.

### EXCESSIVE DISTRESS.

See DISTRESS, 1.

### EXCEPTIVE HIRING.

See SETTLEMENT, 7. 9.

### EXECUTION.

#### I. Of deeds.

See BANKRUPT, 4.—DEED, 1.

#### II. Of powers.

See POWER, I.

#### III. Upon judgments.

See ANNUITY, 3.—BAIL, 1.—BANKRUPT, 6.—BARON AND FEME, 2.—CAPIAS AD SATISFACIENDUM.—FIXTURES, 1.

1. Under a *fi. fa.* the sheriff cannot take fixtures in a house whereof the debtor is seised in fee. *Place v. Fagg.* 277

### EXECUTORS.

#### I. Discharged from debt to testator.

1. If the holder of a promissory note

## EXECUTORS.

appoint the maker his executor the debt is discharged; and no action lies on the note even by the indorsee of the executor. *Freakley v. Fox.* Page 18

#### II. Disclaimer by.

2. Where one of several executors, to whom lands are devised for sale, refuses by parol to act, such refusal deprives him of the character of executor, and thereby vests the estate in the acting executors, by 21 H. 8, c. 4, without any disclaimer. 190, n.

#### III. Authority of, as against legatee.

3. Notwithstanding a specific bequest of stock, the executor is entitled to transfer it, unless he has assented to the bequest. *Franklin v. Bank of England.* 11
4. And an action lies for the executor against the Bank of England, for not permitting him to transfer such stock. *ibid.*

#### IV. Plene administravit.

5. A plaintiff who takes judgment of assets *quando* upon *plene administravit*, and obtains a verdict on *non assumpsit testator*, is entitled to judgment for the costs *de bonis testatoris, et si non, de bonis propriis.* *Marshall v. Wilder.* 607
6. After a verdict for the defendant upon *plene administravit*, the plaintiff may have a *sci. fa.* out of the same record to have execution upon the subsequently acquired assets. 612 (a)

#### V. Where liable to pay costs.

7. An executor nonsuited, &c. upon a declaration containing a count on an account stated with the plaintiff, as executor, of moneys owing to him as executor, is liable for costs in respect of such count. *Dowbiggin v. Harrison.* 622

#### VI. Where liable to pay interest.

See 179 (a).

## FIERI FACIAS.

### EXECUTORY DEVISE.

*See* 75 (a).

### EXPRESS MALICE.

*See* LIBEL, 6, 7.

### FACTORY.

*See* SETTLEMENT, 9.

### FALSE ENTRIES.

*See* ARTICLES OF WAR, 1.

### FALSE IMPRISONMENT.

*See* ARREST, 1.—JUSTICES, 1, 3, 4.

### FEE SIMPLE.

*See* FIXTURES, 2.

### FELONY.

1. In *Cox v. Coleridge*, (2 D. & R. 86, 1 B. & C. 371,) the statutes 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, whereby the examination of a prisoner charged with felony and the informations of those that bring him are made evidence against the prisoner, do not appear to have been brought before the Court. *Page* 437 (b)

### FEME COVERT.

*See* BARON AND FEME.

### FEOFFMENT.

*I. Proof of.*

1. Livery of seisin cannot be presumed from a possession of less than twenty years. *Doe d. Wilkins v. Marquess of Cleveland*. 666
2. An indorsement on a feoffment, that *A.* delivered seisin in the presence of *B.*, is no evidence of the fact against the party out of whose possession the feoffment comes, but who does not claim under it. *ibid.*

## FIERI FACIAS.

*I. What may be taken under.*

*See* BARON AND FEME, 2.—  
FIXTURES, 1.

## FORMEDON. 765

*II. Effect of.*

1. After a return of *fieri feci*, as to part, and *nulla bona ultra*, a *ca. sa.* may issue. *Stevenson v. Crease*. *Page* 561
2. And bail may be fixed upon a *ca. sa.* so issued. *ibid.*

### FISHERY.

*I. Several.*

*See* 32, 33, n.

### FIXTURES.

*I. When passing with house.*

1. By a mortgage of a mill, the stones, tackling and implements, necessary for the working of the mill, pass to the mortgagee. *Place v. Fagg*. 277

*II. When seizable in execution.*

2. Under a *fi. fa.* the sheriff cannot take fixtures in a house whereof the debtor is seised in fee. *ibid.*

### FORCIBLE ENTRY.

*I. Restitution.*

1. Upon the trial of an indictment for a forcible entry or detainer under 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, the party dispossessed is not a competent witness for the prosecution. *Rex v. Williams*. 471
2. Nor is it competent to the defendant to impeach the title of the party dispossessed. *ibid.*
3. Where such an indictment is brought before K. B. by *certiorari*, that Court is bound upon conviction to award restitution. *ibid.*
4. But before trial it is discretionary to award or refuse restitution. *ibid.*

### FORGERY.

*See* BILL AND NOTE, 5.

## FORMEDON.

*I. Warrant with assets.*

1. After a verdict for the demandant

## 766 FRAUDS, STATUTE OF.

in formedon, where the tenant has pleaded warranty with assets, the tenant cannot have a *sci. fa.* upon the judgment in respect of assets subsequently descended.

Page 612 (a)

### FRAUD.

See ARTICLES OF WAR, 1.—BANKRUPT, VI.—PLEADING, 1.

## FRAUDS, STATUTE OF.

### I. Surrender.

1. The cancellation of a lease is not a surrender by operation of law. *Doe d. Courtail v. Thomas.* 218
2. The fact of a lease being found in the possession of a lessor in a cancelled state, is no evidence of a surrender by deed or note in writing. *ibid.*

### II. Agreement not to be performed within year.

3. An agreement to hire a carriage for more than one year, determinable at any time upon payment of a year's hire, is an agreement not to be performed within one year from the making thereof, and must be signed by the party to be charged therewith. *Burch v. Earl of Liverpool.* 380

### III. Sale of lands.

See 4.

### IV. Sale of goods.

4. *A.*, by parol, sold to *B.* the timber of certain growing trees at a price exceeding 10*l.*; *B.* gave directions for cutting the trees, and offered to sell the butts to *C.*; *A.*, by letter, required *B.* to pay for the timber; *B.*, by letter, answered that he had bought the timber, but that it was conditioned to be sound, and was not so:—Held, first, that this was not a contract for the sale of lands or any interest in the land within the fourth sec-

## HIRING.

tion of the statute; secondly, that there was no binding contract for the sale of goods within the seven-teenth section; thirdly, that the letter varying in the terms of the bargain, did not constitute a note in writing of the contract; and fourthly, that there was no part-acceptance or actual receipt of the goods by the buyer. *Smith v. Surman.* Page 455

## FREE WARREN.

See 32.

## GAME.

### I. Servant.

1. An unqualified servant going out with his qualified master and shooting game in his presence, and for his use, is liable to a penalty under 5 *Anne*, c. 14, for keeping and using a gun to kill game. *Ex parte Syl-vester.* 5

## GAZETTE.

See INSURANCE, 1.

## HEIR.

### I. Descent to.

And see FORMEDON.

1. A particular estate of freehold cannot be taken by descent. 74 (a)

### II. Disinherison of.

2. Impropriety of expression "that an heir cannot be disinherited by the plainest intention apparent on face of will, unless the estate be completely disposed of to some one else." 71 (d)

### III. Security for costs by.

See COSTS, 8.

## HIRING.

### I. Locatio operis faciendi.

See JUSTICES, 1.—MASTER AND SERVANT.—SETTLEMENT, IV.

## IMPLIED MALICE.

### II. *Locatio rei*.

See FRAUDS, STATUTE OF, 3.—  
SETTLEMENT, II.

### HOUSES.

See FIXTURES.

#### I. *Injury to*.

See ACTION ON THE CASE, 1.—HUN-  
DRED, 1, 2, 3, 4.—SEWERS, 2.

### HUNDRED.

#### I. *Who may sue*.

1. A termor, and also the party seised of the freehold subject to the term, may each recover damages to the extent of 200*l.* against the hundred for the injury resulting from a felonious burning, in respect of their several possessory and reversionary interests. *Pellcw v. Hundred of East Wonford*. Page 130

#### II. *Notice*.

2. The two days allowed by 9 *Geo.* 1, c. 22, for giving notice of the offence were held to be exclusive of the day on which the fire happens. *ibid.*

#### III. *Examination on oath*.

3. Where the reversioner sues, no servant of his having had the care of the premises, such reversioner is the proper person to give in an examination. *ibid.*
4. The examinant is not bound to state mere suspicions entertained by him as to the person who committed the offence, unless interrogated thereto by the magistrate. *ibid.*

### HUSBAND.

See BARON AND FEME.

### ILLEGAL CONTRACT.

See INSURANCE, 1.—OFFICE, 1.

### IMPLICATION.

See ESTATE, 1.

### IMPLIED MALICE.

See LIBEL, 6, 7.

## INCOMPATIBILITY. 767

### IMPRISONMENT.

See ARREST, 1.—JUSTICES, 1, 3, 4.

### INCLOSURE ACT.

And see WAY, 1.

#### I. *Allotments*.

1. The lord of a manor, by copy of court roll granted an ancient tenement to *A. B.* and *C.* for life. *A.* died in 1825, and *B.* in 1826, leaving *C.* surviving. After the grant, an act passed for inclosing the waste lands of the manor, enacting, that all persons having rights of common over the waste lands should give the commissioners a written statement of their claims, and that the determination of the commissioners should be final, that the commissioners should allot the waste lands among all persons and proprietors interested therein in respect of their ancient tenements, and that the act should not extend to alter and annul any will or settlement of any of the lands intended to be inclosed, but that the lands allotted should, immediately after such allotment, enure to the same uses and purposes as the tenements in respect of which the allotments should be made then were, or would have been, if the act had passed. Neither *A.* nor *C.* made any claim before the commissioners. *B.* did make a claim, and the commissioners awarded allotments to *B.* and to the lord, according to their respective rights and interests in respect of the ancient tenement:—Held, that the claim by *B.* enured for the benefit of all parties interested in the ancient tenement, and that the award vested the legal estate in the allotments in *A. B.* and *C.* successively. *Doe v. Hel-lard*. Page 736

### INCOMPATIBILITY.

See CORPORATION, 2.

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### INDEMNITY.

See BILL AND NOTE, 3.

### INDENTURE.

See APPRENTICE, 1.

### INDICTMENT.

See FORCIBLE ENTRY, 1.

### INDUCEMENT.

See PLEADING, 1.

### INFERIOR COURT.

#### I. *Effect of proceedings in.*

1. Where a defendant suffers judgment by default in an inferior Court and moves the proceedings into a superior Court, in which he pleads to issue, the judgment by default is not even *prima facie* evidence of the right of action. *Bottings v. Firby.* Page 567

### INFORMATION.

#### I. *In personam.*

1. An information for penalties is in the nature of a civil action. 363

### INFORMER.

See CRIMINAL INFORMATION, 1.

### INHABITANT.

See CORPORATION, 1.

### INJUNCTION.

See INTEREST, 12, 13.

## INSOLVENT DEBTOR.

#### I. *Extent of discharge.*

1. *B.* gave to *A.* a bond and warrant of attorney to secure the re-investment of stock lent. After judgment entered up, *B.* was discharged under the insolvent act, 53 Geo. 3, c. 102, as to his scheduled creditors, of whom *A.* was one. *B.* being afterwards arrested in an action on

## INSURANCE.

the judgment was discharged out of custody upon filing common bail. *Salmon v. Miller.* Page 551

2. *Semble*, that the debt itself was barred. *ibid.*

### INSPECTION.

See ACTION, 1.

## INSURANCE.

#### I. *Blockade.*

1. If a ship, the cargo of which is insured, sail from a British port, and notice is afterwards given in the Gazette that the foreign port to which she is bound is blockaded, it is a question of fact for the jury, in an action upon the policy, the ship having been captured, whether the captain knew of the blockade or not. *Harratt v. Wisc.* 521
2. Goods were insured at and from *L.* to any port in the river *P.*, the policy was effected and the ship sailed after notification that those ports were blockaded, the ship was captured by the blockading squadron in the river *P.* but was rescued by her own crew, and brought back with the goods undamaged to *L.*; notice of abandonment was given in the interval between intelligence of the capture and of the rescue, but after the rescue in fact. There was no intention to violate the blockade:—Held, that the voyage as insured was not illegal; but that there was not a total loss. *Naylor v. Taylor.* 526

#### II. *Abandonment.*

3. A ship being deserted at sea by the crew, for the preservation of their lives, the assured on goods abandon. She is afterwards towed into port, but the goods are so much damaged as not to be worth sending to their place of destination:—Held, a total loss. *Parry v. Aberdeen.* 343

## JOINT STOCK COMPANY.

### INTEREST.

#### *When recoverable.*

1. Against an agent. *Page* 179 (a)
2. Against an assignee. *ibid.*
3. Against an executor. *ibid.*
4. Against a partner. *ibid.*
5. For money lent. 307 (a)
6. A security for money lent, whereby the borrower promises to pay the creditor 135*l.* in one month after his arrival in England, carries no interest. *Page v. Newman.* 305
7. When payable on a promissory note. 307 (a)
8. Not payable on bond conditioned to remit goods of a certain value within a certain time. 309 (b)
9. Recoverable on money awarded to be paid on a certain day. 310
10. Not recoverable on a single bond. *ibid.*
11. Not recoverable upon the arrears of an annuity. *ibid.*
12. Except where annuitant has been delayed by injunction. *ibid.*
13. Decreed against executors upon mesne profits, who at the instance of the occupier had stayed an ejectment by rule of Court and by injunction. *ibid.*
14. When payable on book debts. *ib.*

### IRREGULARITY.

*See* ERROR, 2.—PRACTICE, 1.

### JOINT CONTRACTOR.

*See* LIMITATION OF ACTIONS, 1.—WITNESS, 2.

## JOINT STOCK COMPANY.

### *I. Liability of adventurers.*

1. *A.* signs a prospectus of a joint stock distillery company, the general import of which is, that a company shall be thereafter formed, but which speaks of "the condition upon which this establishment is formed." *A.* never pays his subscription. *A.* is not liable as a partner to pay for goods supplied  
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to the distillery by a person who knew he had signed the prospectus, although *A.* was present when premises were taken for the distillery and solicited persons to become subscribers. *Bourne v. Freeth.*

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### JUDGMENT.

#### *I. Of future assets.*

1. A plaintiff who has taken judgment of assets *quando acciderint* upon a plea of *plene administravit*, and obtains a verdict upon an issue on *non assumpsit testator*, is entitled to judgment for the costs "*de bonis testatoris, et si non, de bonis propriis.*" *Marshall v. Wilder.* 607

#### *II. By default.*

*See* INFERIOR COURT, 1.

#### *III. Non obstante veredicto.*

*See* PLEADING, 1.

#### *IV. As in case of a nonsuit.*

*See* TRIAL, 2.

### JURISDICTION.

*See* ARREST, 1.—COURT MARTIAL, 1.  
—JUSTICES, 1.

### JURY.

#### *I. Duties and authority of.*

1. In cases of libel, *see* LIBEL, 3.
2. In cases of fraud, *see* VENDOR AND PURCHASER, 5, 6.

## JUSTICES.

### *I. Jurisdiction in respect of labourers.*

1. A contract to weave certain goods at the house of the weaver, is not a contract to serve within 4 *Géo.* 4, c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver "for neglecting his work after commencing upon the same." *Hardy v. Ryle.* 295

#### *II. Jurisdiction in felony.*

*And see* HUNDRED, 4.

2. The statutes 1 & 2 *Ph. & M. c.* 13, and 2 & 3 *Ph. & M. c.* 10,  
3 D



making the examination of a prisoner charged with felony, and informations of those that bring him, evidence against the prisoner, not brought before the court in *Cox v. Coleridge*. Page 447 (b)

### III. Commencement of action against.

3. An action for false imprisonment against a magistrate may be commenced on the 14th of June, where the plaintiff is discharged out of custody on the 14th of December. *Hardy v. Ryle*. 295

### IV. Notice of action against.

4. Notice of action against justices served 15th May: latitat issued 15th June. *Qu.* whether issued too soon. *Gould v. Hole, MS.* 301 (n)

## LABOURERS.

See JUSTICES, I.—SETTLEMENT, IV.

## LANDLORD AND TENANT.

See BANKRUPT, 11.

### I. Tenancy from year to year.

1. A demise from year to year generally by a tenant from year to year, is in legal effect a demise from year to year during the continuance of such tenant's term, and may be properly pleaded as such. *Pyke v. Eyre*. 661

### II. Estoppel.

2. Tenant, how far estopped from denying title of lessor. 198

## LEASE.

See BANKRUPT, 11.—DEVISE, 4.—EJECTMENT, 3.

## LEASING POWER.

See POWER, 4.

## LEGACY.

1. Notwithstanding a specific bequest of stock, the executor is entitled to

## LIBEL.

transfer it, unless he has assented to the bequest. *Franklin v. Bank of England*. Page 11

## LEGITIMATION.

1. As to the legitimation of antenuptial children by marriage, see 107 (a).

## LETTERS.

See AGENT, 2.—VENDOR AND PURCHASER, 1.

## LIBEL.

### I. What amounts to.

1. A written or printed publication stating that *A.* "has been guilty of gross misconduct in insulting persons in a barefaced manner," is libelous. *Clements v. Chives*. 127
2. Distinction between oral and written slander. 130
3. Where in a civil action the tendency of an alleged libel is to injure the plaintiff, it is the duty of the judge to state to the jury that the publication is a libel, without leaving it to them to consider whether it was the intention of the defendant to injure the plaintiff. *Haire v. Wilson*. 605
4. In a civil action libel or no libel is a question of law. 128 (b)

### II. Publication.

5. What shall amount to a publication. 312 (a)

### III. Privileged communication.

6. In an action by a servant for a libel in the form of a character, it is necessary to shew implied malice, by directly negating the charge, or express malice *aliunde*. *Child v. Affleck*. 338
7. It is no proof of express malice that the master has communicated to the party inquiring his belief as to misconduct after the plaintiff had quitted his service, nor that he has made a similar communication to persons from whom he received the plaintiff with a good character. *ibid.*

## LOAN.

### IV. Evidence.

8. Production of the affidavit filed at the stamp-office, and of a newspaper corresponding with that therein mentioned, is sufficient proof of publication in an action or indictment against the proprietor for a libel. *Mayne v. Fletcher*. Page 311

### V. Defence.

9. A defendant brought up for judgment after being convicted of publishing a libel imputing indictable offences to the prosecutor, cannot be allowed, in mitigation of punishment, to read affidavits alleging the truth of the libel. *Rex v. Halpin*. 8

## LICENCE.

### I. To alien.

1. Effect of licence once granted in destroying a proviso against alienation without licence. 304 (a)
2. Proper form of proviso to avoid its destruction by one licence. *ibid*.

### II. To practice physic.

See COSTS, 1.

## LIMITATION OF ACTIONS.

### I. Revival of liability.

And see BILL AND NOTE, 9, 10.

1. A. and B. give a joint promissory note for 600*l.* to C. In an action by C. against A. and B., an account in which B., as between himself and C., gives credit for interest upon a sum of 600*l.*, is evidence to oust the statute of limitations. *Manderston v. Robertson*. 440

## LIVERY OF SEISIN.

See FEOFFMENT, 1.

## LOAN.

And see MONEY LENT.

### I. Right to recover deposit paid on scrip receipt.

1. A party who pays a deposit to a loan contractor upon a scrip receipt, en-

## MALICIOUS TRESPASS. 771

titling him to a certain portion of the loan on payment of the subsequent instalments, receives a full equivalent for the deposit in the option to become a holder of stock. *Rothschild v. Hennings*. Page 411

2. And if such purchaser omit to pay the instalments at the stipulated periods, he cannot afterwards require the contractor to accept the instalments with interest, or return the deposit. *ibid*.

## LOCAL MILITIA.

See SETTLEMENT, 8.

## LOCKS.

See RATE, 9.

## LONDON.

See MANDAMUS, 1.

## MAGISTRATE.

See JUSTICES.

## MALICE.

See LIBEL, 6, 7.

## MALICIOUS TRESPASS.

### I. What trespasses are within 7 & 8 Geo. 4, c. 30.

1. Where shrubs are cut upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the malicious trespass act, though the title to the spot on which the shrubs grew be in dispute between the parties. *Rex v. Whately*. 431

### II. Course of proceeding.

2. Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him, the magistrate, on oath, whereas no oath had been taken, and the infor-

mation had been first communicated by the magistrate to the informer, the Court, in discharging a rule for a criminal information against the magistrate, refused to give him costs. *Rex v. Whately*. Page 431

## II. *Who within protection of s. 41.*

3. The owner of property arresting a person, in the *bonâ fide* belief that he was acting in pursuance of 7 & 8 Geo. 4, c. 30, s. 28, is entitled to the notice of action required by s. 41 of that statute. *Becchey v. Sides*.

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## MANDAMUS.

### 1. *Sufficiency of return.*

1. Mandamus to the mayor and aldermen of London to admit *A.* into the office of alderman. Return, that by certain proceedings (set out) had at a court of wardmote, *A.* was declared elected; that a return thereof was made to the court of mayor and aldermen; that that court has from time immemorial had cognizance of all elections at wardmote courts to city offices, upon petition by any person interested; that persons interested petitioned against the return of *A.*; that the court of mayor and aldermen, upon inquiry, declared the election void, and that *A.* was not duly elected. Traverse, that *A.* was not duly elected; and issue. Proof, that at the election three poll-clerks were first appointed, and two of them afterwards dismissed; that upon a scrutiny being demanded the wardmote was adjourned, "to meet again on a fresh summons;" that the mayor then went out of office, and the new mayor assembled a wardmote by a fresh summons, took the scrutiny, and declared *A.* duly elected; and that a return thereof being made to the court of mayor and aldermen, they, upon petition, declared the election void:—Held, that the return was good in form: secondly, that the cognizance

## MILITIA.

claimed did not exclude the jurisdiction of the Court of King's Bench: thirdly, that the dismissal of the poll-clerks and the change of the mayor did not invalidate the election: and fourthly, that the mode of adjourning the wardmote was not a dissolution, and did not affect the scrutiny. *Rex v. The Mayor, &c. of London*. Page 36

## MANOR.

See COPYHOLD, 1.

## MARRIAGE.

See BARON AND FEME.

And as to legitimation of antenuptial children, see 107 (a)

## MASTER AND SERVANT.

And see AGENT.—SETTLEMENT, IV.

### I. *Liability of master for negligence of servant.*

1. A master ordered his servant to lay rubbish near his neighbour's wall, but not to let it touch the wall; it did naturally and unavoidably touch the wall, in spite of the servant's care to prevent it: the master was held liable in trespass. *Gregory v. Piper*. 500

## MAYOR.

See MANDAMUS, 1.

## MEASUREMENT OF DISTANCE.

See COVENANT, 1.

## MERSEY AND IRWELL NAVIGATION.

See RATE, 1.

## MESNE PROFITS.

See INTEREST, 13.

## MILITIA.

See COUNTY TREASURER, 3.—SETTLEMENT, 8.

## MISDIRECTION.

### MILL.

See FIXTURES, 1.

### MILL-STONE.

See FIXTURES, 1, 2.

### MINE.

See COVENANT, 2, 3.

### MISDEMEANOUR.

See ARREST, 1.—ARTICLES OF WAR, 1.

## MISDIRECTION.

I. *Cases where rules for new trials, on the ground of nonsuit, misdirection, &c., were refused.*

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| 1. Burch v. Earl of Liverpool.  | Page 380 |
| 2. Child v. Affleck.            | 338      |
| 3. Doe d. Ambler v. Woodbridge. | 302      |
| 4. Hall v. Curzon.              | 565      |
| 5. Mayne v. Fletcher.           | 311      |
| 6. Page v. Newman.              | 305      |
| 7. Sharp v. Bailey.             | 4        |
| 8. Sinclair v. Bowles.          | 1        |
| 9. Surtees v. Ellison.          | 586      |
| 10. Wansell v. Southwood.       | 359      |

### II. Rules discharged.

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| 11. Codling v. Johnson.                           | 671 |
| 12. Doe d. Sweeting v. Hellard.                   | 736 |
| 13. Early v. Garrett.                             | 687 |
| 14. Glasspool v. Young.                           | 533 |
| 15. Gregory v. Piper.                             | 500 |
| 16. Haire v. Wilson.                              | 605 |
| 17. Harratt v. Wise.                              | 521 |
| 18. Leigh v. Hind.                                | 579 |
| 19. Naylor v. Taylor.                             | 526 |
| 20. Peyton v. Governors of St. Thomas's Hospital. | 625 |
| 21. Pike v. Eyre.                                 | 661 |
| 22. Pope v. Biggs.                                | 193 |
| 23. Poulton v. Lattimore.                         | 288 |
| 24. Small v. Marwood.                             | 181 |
| 25. Spargo v. Brown.                              | 638 |
| 26. Wood v. Norton.                               | 673 |

### III. Rules absolute.

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| 27. Bottings v. Firby. | 567 |
| 28. Bourne v. Freeth.  | 512 |

## MORTGAGE. 773

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| 29. Carr v. Stephens.                        | Page 590 |
| 30. Delane v. Hillcoat.                      | 175      |
| 31. Doe d. Courtail v. Thomas.               | 218      |
| 32. ——— d. Wilkins v. Marquess of Cleveland. | 666      |
| 33. Galliers v. Moss.                        | 268      |
| 34. Hardy v. Ryle.                           | 295      |
| 35. Heane v. Rogers.                         | 480      |
| 36. Jones v. Fort.                           | 551      |
| 37. ——— v. Yeates.                           | 613      |
| 38. Smith v. Surman.                         | 455      |
| 39. Sparrow v. Chesman.                      | 206      |
| 40. Sweeting v. Halse.                       | 287      |
| 41. Tomkins v. Savory.                       | 538      |

## MONEY LENT.

### I. Rights of lender.

See BENEFICE, 1.

1. A security whereby the borrower engages to repay the loan in one month after his arrival in England does not carry interest. *Page v. Newman*, 305; and see 307 (a)

## MONEY PAID.

See AFFIDAVIT, 1.

## MORTGAGE.

### I. Interest of mortgagee in fixtures.

1. By a mortgage of a mill, the stones, tackling and implements necessary for the working of the mill, pass to the mortgagee. *Place v. Fagg*, 277

### II. Interest of mortgagee in rents reserved by mortgagor.

2. A mortgagee, after notice to a tenant holding under a demise made by the mortgagor subsequently to the mortgage, is entitled to rent due at the time of the notice as well as that accruing due afterwards. *Pope v. Biggs*, 193
3. An agent having received such rents for the mortgagor after his bankruptcy, is entitled to hold them for the benefit of the mortgagee, against the assignees of the mortgagor. *ibid.*

III. *By what words devised.*

4. Lands of which *A.* is mortgagee in fee will not pass under a general devise of all *A.*'s lands, if the devise be subjected to uses which *A.* was not entitled to declare in respect of the mortgaged lands. *Galliers v. Moss.* Page 268
5. A bequest by *A.* to *B.*, his executors, administrators and assigns, of *A.*'s stock in trade, ready money, and securities for money, debts, personal estate and effects, will not carry *A.*'s legal estate in a mortgage in fee, although a trust be declared that *B.*, his heirs, executors, administrators, and assigns, shall invest the produce thereof, and of *A.*'s real estates, (devised to *B.* by a separate clause, which does not affect the mortgaged property,) in the purchase of land to be conveyed to certain uses in strict settlement. *ibid.*

## NEGLECTANCE.

See ACTION ON THE CASE.—MASTER AND SERVANT, 1.—SEWERS, 2.

## NEW ASSIGNMENT.

See COSTS, 3.

## NEWSPAPER.

See LIBEL, 8.

## NEW TRIAL.

See COSTS, 6.—MISDIRECTION.

## NON OBSTANTE VEREDICTO.

See PLEADING, 1.

## NON RESIDENCE.

See CORPORATION, 1.

## NONSUIT.

See MISDIRECTION.

## NOTE.

See BILL AND NOTE.

## OFFICER.

## NOTICE.

I. *Of Action.*

1. The owner of property, arresting a person in the *bond fide* belief that he was acting in pursuance of 7 & 8 Geo. 4, c. 30, s. 38, is entitled to the notice of action required by s. 41 of that statute. *Beechy v. Sides.* Page 634
2. A month's notice of action against justices is served on the 15th May—process issued 15th June. Whether issued too soon, *quære.* *Gould v. Hole.* 301, n.

II. *Of dishonour.*

See BILLS AND NOTE, IV.

III. *Of intention to remove adjoining house.*

See ACTION ON THE CASE, 3.

## NUISANCE.

See ACTION ON THE CASE, 1, 2.—SEWERS, 2.

## OBLIGATION.

See COUNTY TREASURER, 1.—INTEREST, 7, 9.

## OCCUPIER.

See HUNDRED, 2.—RATE, 1, 2.

## OFFICE.

1. What shall be an office of profit under 3 Geo. 4, c. 125, s. 65.

## OFFICER.

I. *Corrupt appointment.*

1. Where after the recital of the appointment of *A.* to be deputy to *B.* in the execution of an office within the purview of 5 and 6 Edw. 6, c. 16, or 49 Geo. 3, c. 26, *A.* paying thereout to *B.* an annual sum, the condition of the bond in suit is stated to be for the payment by *A.* to *B.* of such annual sum generally, it is a good plea in bar to say that the bond was given in pursuance

## PAUPER.

of an agreement to pay such sum absolutely and at all events. *Greville v. Atkins.* Page 372

2. *Semble*, that the condition taken *per se* shews the bond to be given upon an illegal contract. *ibid.*

## ORDER.

I. *Of nisi prius.*

*See* WITNESS, 7.

II. *Of removal.*

*See* APPEAL, 1.

## PARISH CHEST.

*See* EVIDENCE, 7.

## PARTNERS.

*And see* ATTORNEY, 1.

1. *Authority of partner over the partnership property.*

1. *A.*, the partner of *B.*, is also in partnership with *C.*, *A.* being indebted to the firm of *A.* and *B.* indorses to *A.* and *B.* a bill belonging to the firm of *A.* and *C.*, and immediately afterwards indorses it in the names of *A.* and *B.* to *D.*, a creditor of *A.* and *B.*, who receives the amount at maturity, *A.* and *C.* afterwards become bankrupts, their assignees cannot maintain trover against *B.* *Jones v. Yates.* 613

2. Nor can such assignees maintain an action against *B.* for money taken by *A.* from the funds of *A.* and *C.*, and applied to the use of *A.* and *B.* *ibid.*

II. *Liabilities of partners.*

*See* JOINT STOCK COMPANY, 1.

3. In assumpsit by *A.* against *B.* and *C.*, *D.* is a competent witness to prove a joint contract by *B.*, *C.* and *D.*, although the liability of *D.* on the contract appear *aliunde.* *Hall v. Curzon.* 565

4. As to liability of partners to interest, *see* 179 (a)

## PAUPER.

*See* RATE.—SETTLEMENT.

## PLEADING. 775

### PENAL ACTION.

*See* TURNPIKE ROADS, 1.

### PENALTY.

*See* COUNTY TREASURER, 1.—INFORMATION, 1.

### PER QUÆ SERVICIA.

I. *Where it lies.*

1. To compel tenant to attorn to a grant of the seigniori. 196, n. 197, n.

### PLEADING.

I. *Plea.*

1. A plea stating that the plaintiff and the defendant's other creditors agreed to accept a composition and release their debts, that several creditors, relying upon the agreement, excused a release, and that the plaintiff afterwards obtained and accepted the bond in suit for the residue of the plaintiff's debt by fraud and covin, without the knowledge or consent and in fraud of the other creditors, is tantamount to an allegation, not of fraud and covin generally, but of fraud and covin effected by the particular means described in the inducement; and as the facts stated do not shew any stipulation for the giving of the bond contemporaneous with the agreement for the composition, the plaintiff is entitled to judgment *non obstante reredicto*, after an issue upon the fraud and covin found in favour of the defendant. *Tuck v. Tooke.* Page 393

2. Where after the recital of the appointment of *A.* to be deputy to *B.* in the execution of an office within the purview of 5 and 6 *Edw.* 6, c. 16, or 49 *Geo.* 3, c. 26, *A.* paying thereon to *B.* an annual sum, the condition of the bond in suit is stated to be for the payment by *A.* to *B.* of such annual sum generally, it is a good plea in bar to say that the bond was given in pursuance

of an agreement to pay such sum absolutely and at all events. *Greville v. Atkins.* Page 372

3. A plea of way by prescription over *A.* to *B.* is not disproved by shewing that forty-eight years ago *B.* was part of a common, inclosed under an act of parliament and allotted to the party under whom the defendant justifies. *Codling v. Johnson.* 671
4. A demise from year to year, generally, by a tenant from year to year, is, in legal effect, a demise from year to year during the continuance of such tenant's term, and may be properly pleaded as such. *Pike v. Eyre.* 661

#### II. *New assignment.*

5. Issue on justification; and a new assignment, on which judgment is suffered by default. Upon a verdict for the defendant on the issue, he is entitled to the whole costs of the trial, provided no other plea covering the trespasses newly assigned be found for the plaintiff. *Cross v. Johnson.* 290
6. Where the general issue is on the record, and the defendant means to suffer judgment by default on a new assignment, so much of the general issue, as applies to the trespasses newly assigned, should be withdrawn. *ibid.*

#### POLL CLERK.

See MANDAMUS 1, and pages 36, 66.

#### POOR.

See APPEAL.—RATE.—SETTLEMENT.

#### POWER.

##### I. *Execution of.*

1. Where a party, who has an estate, and also a power, executes a deed which is defective under the power, but which would be good at common law, the estate will pass, though the party contemplated only

an execution of the power. *Doe d. Daniel v. Keir.* Page 101

2. An appointment directed to be signed, sealed and delivered in the presence of two credible witnesses is not well executed if signed, sealed and delivered in the presence of two persons, to one of whom an estate is appointed therein by way of remainder. *ibid.*

##### II. *Construction of.*

3. Where under a power lands are appointed to *A.*, to the use of *B.*, the legal estate remains in *A.* *Doe d. Worger v. Haddon.* 118
4. An estate was settled on *A.* for life, with power to charge it with an annuity for her husband, and portions for their younger children, and to grant leases. *A.* granted the estate to trustees for 500 years, on trust, if she should so direct, to raise portions by mortgage or sale:—Held, that the term, till called into operation, was subservient to the leasing power and was no answer to an ejectment by a lessee holding under a lease granted subsequently to the settlement. *Doe d. Courtail v. Thomas.* 218

#### PRACTICE.

##### I. *Trial.*

1. Where a declaration contains a count for an excessive distress, and a count in trover, it is competent to the plaintiff at the trial to abandon the special count, and, denying the tenancy, to recover under the count in trover, without giving any previous intimation that he will take that course. *Spargo v. Brown.* 638

##### II. *Consequence of not praying a tales.*

2. Where a special jury cause is not tried because neither party prays a tales, the defendant cannot have judgment as in case of a nonsuit, or try the cause by proviso. *Phillips v. Dance.* 584

## PRODUCTION OF DEEDS.

### III. Execution.

3. Where a *ca. sa.* not indorsed with the abode and addition, or other description of the parties against whom it issues, is received by the sheriff without objection, the Court will not set aside the writ unless this non-compliance with the rule *H. 2 & 3 Geo. 4.* place the sheriff in a position in which he ought not to stand, as where it subjects him to the risk of an action for an escape. *Clarke v. Palmer.* Page 141

### IV. Irregularity.

And see PROCESS.

4. A rule to set aside proceedings for irregularity was made absolute upon payment *by the defendant* of costs incurred subsequently to an offer to pay the costs occasioned by the irregularity. *Beeston v. Beckett.* 100

### PRÆTEXTU.

1. To be translated "by reason of," not "by pretence of." 333 (a)

### PRESCRIPTION.

See PLEADING, 3

### PRINCIPAL.

See AGENT.

### PRIVILEGED COMMUNICATION.

See LIBEL, III.

### PROBATE.

See EVIDENCE, 7.

### PROCESS.

#### I. Irregularity.

And see PRACTICE, IV.

1. By issuing an attachment without a previous summons. 110, 113 (a)

## PRODUCTION OF DEEDS.

### I. *At nisi prius.*

1. In ejectment by the lessee against the tenant in possession, the attorney

## RATE. 777

of the lessor is bound to produce the lease, it having been deposited with him by order of a Court of Equity for the inspection of the lessee. *Doe d. Courtail v. Thomas.*

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### PROHIBITION.

See ASSETS.

### PROMISSORY NOTE.

See BILL AND NOTE.

### PROMOTIONS.

See 301, 503.

### PROSPECTUS.

See JOINT STOCK COMPANY, 1.

### PUBLIC-HOUSE.

See COVENANT, 1.

### PURSER.

See ARTICLES OF WAR, 1.

### QUEM REDDITUM REDDIT.

1. To compel terre-tenant to attorn to grant of rent. 196, n.

### QUID JURIS CLAMAT.

1. To compel particular tenant to attorn to grant of reversion. 196, n.

### QUO WARRANTO.

#### I. Upon incompatibility of offices.

1. On a motion for a *quo warranto* information against a corporator, on the ground of the acceptance of an incompatible office, the relator must shew a legal appointment to the second office. *Rex v. Day.* 541

### RATE.

- I. *What property ratable to the relief of the poor.*

1. An act of parliament authorised certain persons to make and maintain the river Avon navigable, to scour the river, to make new cuts through lands adjoining, and to build locks, first making satisfac-



tion to the owners of lands. The act then appointed commissioners for settling and appointing such satisfaction and then empowered the undertakers to take certain tolls. The undertakers made the river navigable, and scoured and cleansed from time to time, and made a cut and lock for the purposes of the navigation on land purchased by them:—Held, that they were not the occupiers of the river Avon, and not ratable in respect of it as land covered with water; but that they were ratable in respect of the cut and the lock made on their own land. *Rex v. Avon Company.*

Page 23

2. Certain persons, under the authority of an act of parliament, make navigable, clear, cleanse, scour, open, enlarge, and straighten a river; dig and cut banks; erect weirs, locks, and dams; make new cuts and trenches through land adjoining, which they purchase; and make towing paths over land partly purchased, and partly rented by them:—Held, that they are not ratable as occupiers of the river, or of the land taken for the purposes of the navigation; but that they are ratable for the new cuts, and trenches, and for the weirs, locks, and dams erected on their own land, *Rex v. Mersey and Irwell Navigation.*

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3. The objects of a charitable foundation, in the actual occupation of alms-houses, living rent-free, and liable to be removed at the will of the patrons, are beneficial occupiers, within the meaning of 43 *Eliz.* c. 2, s. 1, and liable to be rated for the relief of the poor. *Rex v. Green.*

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4. An act of parliament empowered certain undertakers to make navigable a river, and for that purpose to scour and cleanse the river, and to dig and cut the banks. Another act recited that the legal estate and interest in the navigation of the

same river, and in certain lands and buildings, was vested in trustees, whom it empowered to sell and convey in fee the said lands and buildings, and to mortgage in fee the said navigation and the said lands and buildings:—Held, that neither of these acts vested the soil of the bed of the river in the undertakers, and therefore that they were not ratable to the poor as the owners or occupiers of the river. *Rex v. Aire and Calder Navigation.*

Page 729

## II. How calculated.

5. The poors'-rate, in respect of the occupation of land, should be assessed with reference to the sum for which the land would let, not upon the net produce to the occupier. *Rex v. The Trustees of the late Duke of Bridgewater.* 143
6. The possessors of canal property, consisting of the canal, towing-path, and warehouses and offices adjacent, are to be assessed upon the same principle as the occupiers of land. *ibid.*
7. A poors'-rate imposed in respect of two-thirds of the net rent of farms, lands and tithes, and of one half of the net rent of houses and other buildings, collieries, and coal-mines, is not necessarily unequal. *Rex v. Tomlinson.* 169
8. The lessee and occupier of a coal-mine is ratable for the full annual value of the mine, though increased by improvements made at his own expense. *Rex v. Lord Granville.* 171

## II. In what parish.

9. The tolls payable for passing through locks belonging to a canal company, are ratable to the poor wholly in the parish in which the locks are situate. *Rex v. Lower Mitton.* 711

## IV. Appeal.

See APPEAL.

## RENT.

### RECITAL.

#### I. *Effect of.*

See COVENANT, 2.

### RECTORS.

See ANNUITY.

### RE-ENTRY.

See EJECTMENT, 4.

### RELATOR.

See QUO WARRANTO, 4.

### RELEASE.

#### I. *What shall amount to a release.*

See BANKRUPT, 3, 4.—INSOLVENT DEBTOR, 2.

1. The maker of a promissory note is discharged by becoming the executor of the holder. *Freakley v. Fox.* Page 18

### RELIEF.

See SETTLEMENT, 10, 11.

### REMAINDER.

See ACTION ON THE CASE, 1.—POWER, 1.—REVERSIONER.

### REMOVAL.

#### I. *Of causes.*

See INFERIOR COURT, 1.

#### II. *Of paupers.*

See APPEAL.—SETTLEMENT.

### RENT.

See RATE, 3, 7.—SETTLEMENT, II.

#### I. *Acceptance of.*

See COVENANT, 5.

#### II. *Grant of rent.*

See QUEM REDDITUM REDDIT, 1.

#### III. *Interest of mortgagee in rent received by mortgagor.*

See MORTGAGE, II.

## REVERSION. 779

### REPAIRS.

See ACTION, 2.—SEWERS, 2.

### REPRESENTATION.

See ACTION, 5.—STAMP, 1.

### REQUEST.

See AFFIDAVIT, 1.

### RESCUE.

See INSURANCE, 1.

### RESIANCY.

See CORPORATION, 1.

### RESTITUTION OF POSSESSION.

#### I. *Jurisdiction of Court in awarding.*

1. Court has discretionary power upon an indictment found to award or refuse restitution before trial. 471 (b)
2. Bound to award restitution upon conviction. Page 471

### RESULTING USE.

See USE, III.

### RETURN.

See FIERI FACIAS, 1.—MANDAMUS, 1.

### REVERSION.

#### I. *Remedies of reversioner.*

1. Declaration for negligence for pulling down a house adjoining the plaintiff's house in the possession of his tenant without shoring up the walls of the plaintiff's house, whereby it fell, cannot be supported without evidence from which a grant of a right to the support of the house so pulled down can be inferred. *Peyton v. Governors of St. Thomas's Hospital.* 625
2. *Quære*, whether such a right ought not to have been stated in the declaration. *ibid.*
3. A reversioner may recover damages to the extent of 200*l.* against the hundred for the injury resulting

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from a felonious burning, in respect of his reversionary interest, notwithstanding a recovery against the hundred by the tenant. *Pellieu v. Hundred of East Wonford*.

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4. The reversioner suing is the proper person to give in the examination. *ibid.*

And see HUNDRED.

5. The assent of the reversioner to a surrender relates back to the time at which such surrender was executed. 190, n.
6. A decision to the contrary that the surrender is inoperative without the express assent of the surrenderee, and that therefore the surrender can take effect only from the time of the assent, was reversed in *Dom. Proc.* 190, n.
7. To gain a settlement by estate the party must have an estate in possession; a reversionary interest is not sufficient. *Rex v. Ringstead*. 67
8. *A.* being seised of two messuages, devised one to *B. durante viduitate*, and after her decease or her marriage, he devises both messuages to *C.* in fee without any prior disposition of the second messuage. *C.* takes no estate in either messuage till after the death or marriage of *B.*, during whose widowhood the second messuage descends to the heir. *ibid.*

REVOCATION.

See ARBITRAMENT, 3, 4.

RIVER NAVIGATION.

See RATE, 1, 2, 4.

ROOMS.

See COVENANT, 4.

RULE.

See PRACTICE.—CRIMINAL INFORMATION.

SERVANT.

SEARCH.

See EVIDENCE, 7.

SCIRE FACIAS.

1. After a verdict for the demandant in formedon, where the tenant pleaded warranty with assets, the tenant cannot have a *sci. fa.* upon the judgment in respect of assets subsequently descended. Page 612 (a)
2. After a verdict for the defendant upon *plene administravit* the plaintiff may have a *sci. fa.* out of the same record, to have execution of subsequently acquired assets. *ibid.*

SCRIP.

See LOAN, 1.

SCRUTINY.

See MANDAMUS.—And see 50, 64, 65, 66.

SECONDARY EVIDENCE.

See EVIDENCE, VI.

SECURITY FOR COSTS.

See COSTS, III.

SEED.

See VENDOR AND PURCHASER, 4.

SEISIN.

See FEOFFMENT, 1.

SELECT VESTRY.

I. *Regularity of proceedings.*

1. To constitute a valid assembly of a select vestry, appointed under 58 Geo. 3, c. 45, and 59 Geo. 3, c. 134, a majority of the whole number appointed should be present. *Blackett v. Blizzard*. 641

SERVANT.

See LIBEL, 1, 7.—MASTER AND SERVANT, 1.—SETTLEMENT, IV.

## SETTLEMENT.

### SESSIONS.

See APPEAL, I. II.—COUNTY TREASURER, 2.

### SETTLEMENT.

#### I. By estate.

1. To gain a settlement by estate the party must have an estate in possession. *Rex v. Ringstead.* Page 67
2. Messuage *A.* was devised to *M.*, *durante viduitate*, and, after her decease or re-marriage, *A.* and also messuage *B.*, of which the testator made no other disposition, were devised in fee to *N.*, who was not heir to the devisor:—Held, that *N.* took no estate in *A.* or *B.* till after the death or marriage of *M.*, during whose widowhood *B.* descended to the heir of the devisor, and that therefore *N.* gained no settlement by residing in the parish where the messuages were situate, while *M.* continued alive and unmarried. *ibid.*

#### II. By renting a tenement.

3. Under 6 *Geo.* 4, c. 57, a pauper renting a dwelling-house for a year, at the yearly rent of 10*l.* and residing in it forty days, but underletting part of it, is the "occupier," and thereby acquires a settlement: per *Littledale* and *Parke, JJ.*; dissentiente, *Bayley, J.* *Rex v. Inhabitants of Ditchet.* 151
4. It is not necessary, in establishing a settlement under 59 *Geo.* 3, c. 50, to prove that the tenement is of the actual value of 10*l.* a year: it is sufficient if it be proved to have been *bonâ fide* hired at that sum. *Rex v. Ashfield-cum-Thorpe.* 709

#### III. By apprenticeship.

1. An undertaking by the mother of an apprentice, without the knowledge of her husband, to pay the master a sum of money beyond the premium inserted in the indenture and paid by the husband at the time of its execution (the stamps on the indenture being sufficient for both

## SETTLEMENT. 781

sums,) does not make the indenture void, under 8 *Anne*, c. 9, s. 39: the undertaking being void; and no fraud being practised on the revenue. *Rex v. Bourton upon Dunsmore.*

Page 631

#### IV. By hiring and service.

6. An adult contracts to serve a plumber as an articulated servant for four years; to learn his trade at weekly wages; to be considered as an out-apprentice; to do gardening or any other work his master may set him about; and when ill, not to receive wages; the master agreeing to teach him his trade. This is not a contract of hiring and service, but an imperfect contract of apprenticeship, service under which does not confer a settlement. *Rex v. Tipton.* 703
7. A pauper was "hired for a year at 4*s.* 6*d.* a week, to work from six in the morning till seven in the evening, and to make as much overwork as he chose:"—Held, an exceptive hiring, service under which conferred no settlement. *Rex v. Birmingham.* 691
8. A local-militia-man hired himself to serve for a year, without disclosing to his master the fact that he was in the militia:—Held, that this was not a lawful hiring within 3 *W. & M.* c. 11, s. 7, the servant not being *sui juris*, or capable of so hiring himself, notwithstanding the provisions of 48 *Geo.* 3, c. 111, ss. 15 and 24, (the local militia act in force at the time.) *Rex v. Taunton St. James.* 695
9. A pauper hired herself under a written agreement to work in a factory for four years, at weekly wages, and "to observe all the rules with regard to the hours of attendance and of work." The rules were not reduced into writing, and were occasionally varied by the master, but the pauper was told that she must work twelve hours a day:—Held, first, that this was not an exceptive hiring, and that due service under it

conferred a settlement; and secondly, that the parol communication made to the pauper was not admissible evidence to explain the written agreement. *Rex v. St. John, Devizes.* Page 680

V. *By acknowledgment.*

10. Relief given by one parish to a pauper residing in another, is *prima facie* evidence of his being settled in the relieving parish. *Rex v. Yarrowell.* 684
11. But though the Court of Quarter Sessions may properly act upon such evidence they are not bound to do so. *ibid.*

SEWERS.

I. *District, how rated.*

1. Where a district, within one commission of sewers, is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated. *Rex v. The Commissioners of Sewers of Tower Hamlets.* 365

II. *Duty of commissioners.*

2. Upon repairing sewers the commissioners and their agents are bound to take all proper precaution for the security of adjoining houses. 629

And see ACTION ON THE CASE, 1.

SHERIFF.

I. *Rights of Sheriff.*

1. Upon the execution of a *fi. fa.* issued by A. against B., A. asserts that certain goods are the property of B. The assertion is made *bona fide*; and the sheriff believing it, seizes the goods, and is sued in trespass by C., the real owner. A. is liable to the sheriff for the damages and costs in C's action. *Pratt v. Humphreys.* 538 (b)

STAMP.

2. Where a *ca. sa.*, not indorsed with the abode and addition, or other description of the parties against whom it issues, is received by the sheriff without objection, the Court will not set aside the writ, unless this non-compliance with the rule H. 2 & 3 Geo. 4 place the sheriff in a position in which he ought not to stand, as where it subjects him to the risk of an action for an escape. *Clarke v. Palmer.* Page 141

II. *Liabilities of Sheriff.*

3. Remedy against sheriff for an escape. 142 (a)

SHIP.

See ARTICLES OF WAR.—INSURANCE.

SHORING UP HOUSES.

See ACTION ON THE CASE, 1.—  
SEWERS, 2.

SLANDER.

1. As to the distinction between written and oral slander, see 130

SMEETING MILL.

See COVENANT, 2, 3.

SPECIAL JURY.

See PRACTICE, II.

STAMP.

I. *On agreements.*

*Vide supra*, 2.

1. A note in these words, "Bought for Mr. T. fifty Continental Gas shares, 2*l.* premium (8*l.* already paid) 500*l.*, commission 6*l.* 5*s.*," from a broker to his principal, is not a contract, or evidence of a contract, but it is admissible to shew a representation made by the broker to the principal, without any stamp. *Tomkins v. Savory.* 538

## STATUTES.

### II. *On bills and notes.*

2. On the day before an acceptance becomes due, the name of the acceptor is erased, and a new contract between the acceptor and the drawer, who is also the holder, is indorsed on the bill, but is not stamped. The jury cannot look at the indorsement for the purpose of ascertaining whether the acceptance was struck out with the drawer's assent. *Sweeting v. Halse.* Page 287

### III. *On indentures.*

See APPRENTICE, 1.

### IV. *On mortgages.*

3. A bond and a mortgage executed on the same day, for securing the same sum of money, but bearing different dates, require an *ad valorem* stamp on each instrument. *Wood v. Norton.* 673

## STATUTES.

- I. *Distinction between clauses directory, and clauses obligatory and essential.*

See page 63.

### II. *Particular statutes cited or commented upon.*

#### *Henry 6.*

8. c. 9. Forcible Entry. 471

#### *Henry 8.*

21. c. 4. Executors. 190  
27. c. 10. Uses. 74 (a), 118, 191

#### *Edward 6.*

- 5 & 6. c. 16. Public Office. 372

#### *Philip & Mary.*

- 1 & 2. c. 13. Felony. 437 (b)  
2 & 3. c. 10. Felony. *ibid.*

#### *James 1.*

4. c. 3. s. 2. Costs. 405  
21. c. 15. Forcible Entry. 471  
— c. 16. Limitation. 447 (a)

#### *Charles 2.*

- 13 & 14. c. 12. Settlement. 710

## STORES. 783

29. c. 3. s. 4. Frauds and Perjuries. Page 380, 455  
— s. 17. Frauds and Perjuries. 455

#### *William & Mary.*

3. c. 11. s. 7. Settlement. 695

#### *Anne.*

5. c. 14. Game. 5  
8. c. 9. s. 39. Apprentice. 631

#### *George 2.*

12. c. 29. County Treasurer. 230, 248  
22. c. 33. s. 36. Articles of War. 449  
24. c. 44. s. 1. Justices. 295, 301  
25. c. 6. s. 1. Wills. 107

#### *George 3.*

38. c. 78. s. 1. Newspapers. 311  
41. c. 109. Inclosure. 742, 743  
43. c. 47. ss. 9, 16. Militia. 230  
48. c. 111. ss. 15, 24. Local Militia. 695  
49. c. 26. Public Office. 372  
53. c. 102. Insolvent Debtor. 551  
57. c. 99. Ecclesiastical Property. 249  
58. c. 45. Select Vestry. 641  
59. c. 50. Settlement. 709  
— c. 134. Select Vestry. 641

#### *George 4.*

3. c. 126. s. 65. Turnpike Road. 175  
6. c. 16. s. 2. Bankruptcy. 486, 488  
— s. 54, 55. Bankruptcy. 559  
— s. 57. Bankruptcy. 111  
— s. 133. Bankruptcy. 393  
7 & 8. c. 30. ss. 20, 30. Malicious Trespass. 431

## STOCK.

### I. *Bequest of.*

1. Although stock be specifically bequeathed, the executor may compel the Bank to permit him to transfer it, unless it appear that he has assented to the bequest. *Franklin v. The Bank of England.* 11

### II. *Reinvestment of.*

See INSOLVENT DEBTOR, 1, 2.

## STORES.

See ARTICLES OF WAR, 1.

## TALES.

## SUBMISSION.

See ARBITRAMENT, 3.

## SUMMONS.

See ERROR, 1.—MALICIOUS TRESPASS, 2.—MANDAMUS, 1.

## SURETY.

See ANNUITY, 3.

## SURRENDER.

I. *Requisites of, in respect of surrenderor.*

1. Cancellation (of a lease) is not a surrender by operation of law. *Doe v. Thomas.* Page 218
2. A lease found in a cancelled state in the possession of the lessor is not evidence that such lease has been surrendered either by deed, or by note in writing. *ibid.*

II. *Assent of surrenderee.*

3. Where particular tenant surrenders to him in reversion or remainder, and the reversioner or remainderman afterwards assents to the surrender, such assent shall relate back to the period of the surrender. 190, n.
4. A decision to the contrary, viz. that the surrender is inoperative without the express assent of the surrenderee, and that therefore the surrender shall take effect only from the time of the assent, was reversed in *Dom. Proc.* 190, n.

## SURVEYOR.

See AGENT, 2.

## SURVIVORSHIP.

See ATTORNEY, 1.

## TALES.

I. *Consequence of not praying.*

See COSTS.—PRACTICE, 2.

## TOWN CLERK.

## TERM.

See BENEFICE, 1.—PLEADING, 4.—POWER, 4.

## TIME.

I. *Computation of.*

See HUNDRED, 2.—JUSTICES, 3, 4.

## TITHES.

I. *Composition.*

1. Composition for tithes, how determined. Page 337 (b)

II. *Compensation for loss of.*

2. Under a clause in an act giving compensation for the value of lands, tenements and hereditaments, or for damage done thereto, the tithe owner is not entitled to compensation for the injury done to him by the conversion of tithable land taken for the purpose of the navigation, and covered with water. *Rex v. The Commissioners of the Nene Outfall.* 646

## TITLE.

See FORCIBLE ENTRY, 2.—LANDLORD AND TENANT, 2.

## TOLL.

I. *Consideration of.*

1. Toll-thorough cannot be supported without showing a consideration. 31, n.
2. *Secus*, of toll-traverse. *ibid.*

## TOLLS.

See RATE, 1, 2, 4, 9.

## TORT.

See ACTION ON THE CASE.—TRESPASS.

## TOTAL LOSS.

See INSURANCE, 1, 2.

## TOWN CLERK.

See CORPORATION, 3.

## TRIAL BY PROVISIO.

### TRADING.

See BANKRUPT, 2.

### TRANSFER OF STOCK.

See BANK OF ENGLAND, 1.

### TREASURER.

See COUNTY TREASURER, 1.—TURNPIKE ROADS, 1.

### TREES.

#### I. *Sale of.*

See VENDOR AND PURCHASER, 1.

#### II. *Malicious destruction of.*

See MALICIOUS TRESPASS, 1.

### TRESPASS.

#### I. *Against whom maintainable.*

See MASTER AND SERVANT, 1.

#### II. *Pleadings in.*

See TRIAL, 1.

### TRIAL.

#### I. *Course of proceeding at.*

1. Where in trespass the defendant justifies under a right of way, without pleading not guilty, and the plaintiff traverses the justification, and (a) new assigns, and the defendant suffers judgment by default on the new assignment, the defendant is entitled to begin, notwithstanding the plaintiff has to prove his damages on the new assignment. *Rees v. Rogers.* Page 294, n.
2. Where a special jury cause is not tried because neither party prays a tale, the defendant cannot have judgment as in case of a nonsuit, or try the cause by proviso. *Phillips v. Dance.* 584

## TRIAL BY PROVISIO.

See TRIAL, 2.

(a) The words in italics are omitted by mistake in the report.

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## TURNPIKE ROADS. 785

### TROVER.

See PRACTICE, 1.

#### I. *Conversion.*

1. A trader, in contemplation of bankruptcy, delivered bills of exchange to a creditor, who received the money due upon them after the bankruptcy. The assignee brought trover for the bills:—Held, that the receipt of the money by the creditor was not a conversion, and that the plaintiff could not recover without proving a demand and refusal before the bills became due. *Jones v. Fort.* Page 547

### TRUSTEE.

And see TRUSTS, 2.

#### I. *When liable to a common law action.*

See ACCOUNT, 1.

#### II. *When liable to a penal action.*

See TURNPIKE ROADS.

### TRUSTS.

1. Where equivalent to "duties." 245, 247
2. A trust estate may be waived by parol. 191, n.

## TURNPIKE ROADS.

#### I. *Trustees holding places of profit.*

1. By 3 Geo. 4, c. 126, s. 65, no trustee of a turnpike road shall enjoy any office or place of profit under any act of parliament in execution of which he shall have been appointed, or shall act; and if any such trustee shall, without having first resigned such office, hold any such office, he shall forfeit 100*l.* A trustee who holds the office of treasurer, which may be made an office of profit, is within the penal provisions of this statute though he make no profit of the office in his own person. *Delane v. Hillcoat.* 175

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## UMPIRE.

See ARBITRAMENT, 1.

## USAGE.

See CORPORATION, 1, 2.

## USE.

I. *When transferred into possession.*

1. Where, under a power, lands are appointed to *A.* to the use of *B.*, the legal estate remains in *A.* *Doe d. Worger v. Haddon.* Page 118

II. *How waived.*

2. Before the statute of uses an use might have been waived by parol by *cestui que use.* 191, n.

III. *Resulting use.*

3. Upon the conveyance of a party seised in fee, he cannot take a particular estate of freehold by way of resulting use by implication. 74 (a)

## VALUE.

See RATE, 5, 6, 7, 8.—SETTLEMENT, 4.

## VARIANCE.

I. *In matter of description.*

See VENDOR AND PURCHASER, 1.

## VENDOR AND PURCHASER.

I. *Contract, when complete.*

1. *A.*, by parol, sold to *B.* the timber of certain growing trees at a price exceeding 10*l.*; *B.* gave directions for cutting the trees, and offered to sell the butts to *C.*; *A.*, by letter, required *B.* to pay for the timber; *B.*, by letter, answered that he had bought the timber, but that it was conditioned to be sound, and was not so. In assumpsit for the price of the timber:—Held, first, that this was not a contract for the sale of lands, or any interest in land, within the fourth section of the Statute of Frauds (29 *Car.* 2, c. 3); secondly, that there was no binding

contract for the sale of goods within the seventeenth section; thirdly, that the letters did not constitute a note in writing of the contract, because they varied in their description of the terms of the contract; and, fourthly, that there was no part-acceptance or actual receipt of the goods by the buyer. *Smith v. Surman.* Page 455

II. *Entirety of contract.*

2. The seller of 250 bushels of wheat, to be delivered within a certain time, delivering 130 bushels only, which the purchaser accepts and retains after the expiration of the stipulated time of delivery, may recover the price of the part delivered. *Oxendale v. Wetherell.* 429
3. Upon an entire contract "to repair a damaged chandelier and make it complete for 10*l.*," no action lies for the value of a partial repair, though beneficial to the defendant, and consisting partly in a supply of goods, such goods not having been demanded back. *Sinclair v. Bowles.* 1

III. *Delivery.*

*Vide supra*, pl. 1, 2.

IV. *Warranty.*

4. *A.* sold to *B.* saintfoin seed, warranted to be "good new growing seed." Soon after delivery, *B.* was told that the seed was not good new growing seed, but he nevertheless sowed part, and sold the rest, without giving any notice of the defect to *A.*:—*A.* cannot recover the price if the seed did not correspond with the warranty. *Poulton v. Lattimore.* 208

V. *Concealment.*

5. The purchaser of an estate cannot recover back his purchase-money on the ground of a concealment of a defect in the title by the vendor, without proving that such conceal-

## WAREHOUSES.

ment was fraudulent. *Early v. Garrett.* Page 687

6. And the question of fraud is properly one for the jury. *ibid.*

VI. *What buying and selling shall constitute the party a trader.*

See *BANKRUPT*, 2.

VII. *Devise in trust for sale.*

See *ACCOUNT*, 1.

## VENIRE DE NOVO.

I. *When issuable.*

1. Not awarded where judgment is reversed for the insufficiency of the whole declaration. 128 (a)

## VERDICT.

See *JURY*.—*MISDIRECTION*.

## VESTRY.

See *SELECT VESTRY*.

## VISITOR.

1. Nature of visitatorial power, *vide* 620.

## WAGES.

See *JUSTICES*, 1.—*SETTLEMENT*, 6.

## WAIVER.

I. *Of an estate.*

See *DISCLAIMER*.

II. *Of an use.*

See *USE*, 2.

## WALLS.

See *ACTION ON THE CASE*, I.—*CRIMINAL INFORMATION*, 1.

## WARDMOTE.

See *MANDAMUS*, and see page 37, 50, 56, 64.

## WAREHOUSES.

See *RATE*, 5.

## WILL. 787

### WARRANT OF ATTORNEY.

See *ANNUITY*, 3.

### WARRANT, JUDGE'S.

See *ARREST*, 1.

### WARRANTY.

I. *Real.*

See *FORMEDON*, I.

II. *Personal.*

See *VENDOR AND PURCHASER*, IV.

### WASTES.

See *COPYHOLD*, 1.

### WAY.

I. *Private.*

1. A plea of a way by prescription, over *A.* to *B.* is not disproved by shewing that, forty-eight years ago, *B.* was part of a common, inclosed under an act of parliament, and allotted to the party under whom the defendant justifies. *Codling v. Johnson.* Page 671

### WEAVER.

See *JUSTICES*, 1.

### WEIRS.

See *RATE*, 2.

### WIDOW.

See *SETTLEMENT*, 1,

### WIFE.

See *BARON AND FEMR.*

### WILL.

I. *Of lands.*

See *DEVISE*.

1. The provisions of 25 *Geo.* 2, c. 6, s. 1, rendering a bequest to an attesting witness void, but upholding the will, is confined to wills and codicils affecting the realty. 107

## WITNESS.

I. *Competency of dispossessed.*

1. Upon the trial of an indictment for a forcible entry or detainer under 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15, the party dispossessed is not a competent witness for the prosecution. *Rex v. Williams.* Page 471
2. But it is not competent to the defendant to impeach the title of the party dispossessed. *ibid.*
3. Where such an indictment is brought before the Court of K. B. by certiorari, that Court is bound, upon conviction, to award restitution. *ibid.*

II. *Competency of joint contractor.*

4. In assumpsit by A. against B. and C., D. is a competent witness to prove a joint contract by B., C. and D., although the liability of D. on the contract appear aliunde. *Hall v. Curzon.* 565

III. *Competency of devisee.*

5. Devise, &c. of attesting witness to will rendered void by 25 Geo. 2, c. 6, s. 1. Page 107
6. This provision limited to wills and codicils of real estate. *ibid.*

IV. *Attendance of witnesses.*

7. This Court will not compel a witness to attend before an arbitrator, although the reference be by order of nisi prius. *Wanell v. Southwood.* 359

## WOMAN.

See BARON AND FEME.

## WORK.

See JUSTICES, 1.

## WRIT.

I. *Indorsement of.*

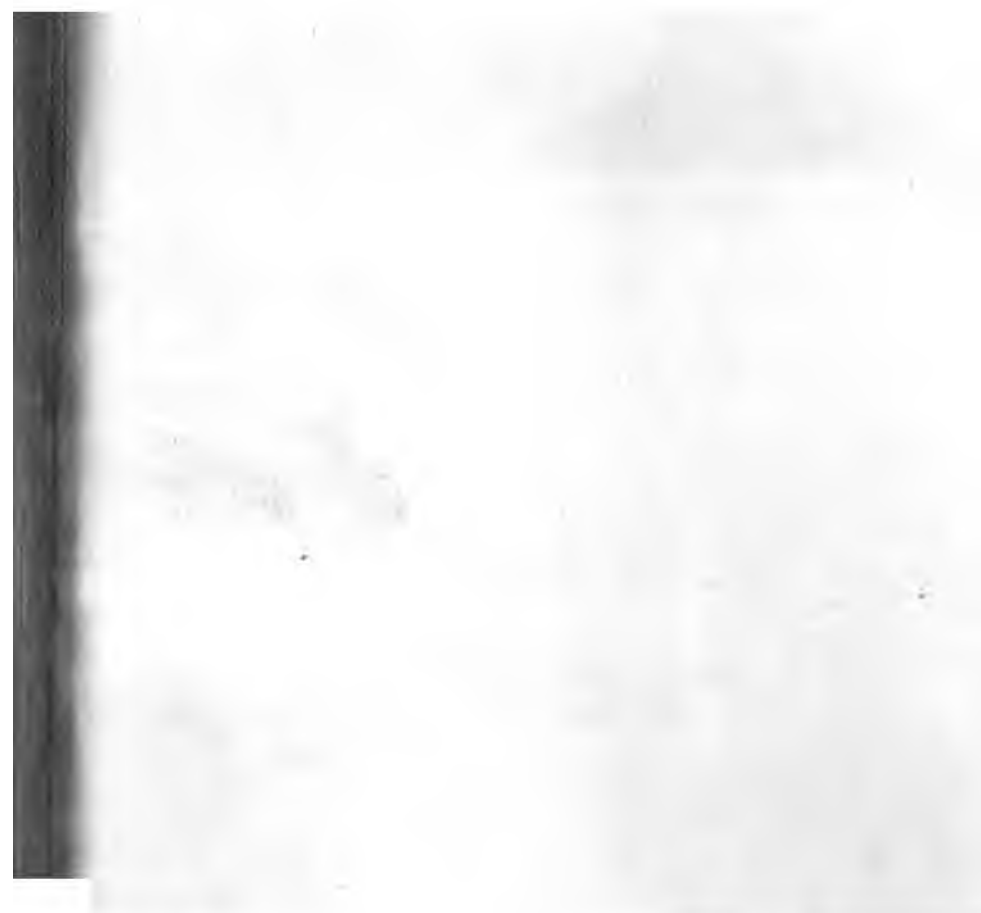
See SHERIFF, 2.

II. *Return to.*

See FIERI FACIAS, 1.—MANDAMUS, 1.

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